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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73- 1694

GEORGE H. BRENNER

*Petitioner,*

*v.*

THE UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, George H. Brenner, prays that a writ of Certiorari issue to review the Opinion and actions of the United States Court of Claims in which that Court, in an Opinion delivered by Judge Skelton (in which opinion two judges joined and one judge concurred, and from which opinion three Judges dissented) rejected the report of Trial Judge C. Murray Bernhardt. (A. 1-32). The Trial Judge had determined that Petitioner had been illegally discharged; the Court of Claims concluded that as a matter of law Petitioner had not been illegally discharged, and accordingly denied him the recovery of active duty pay and /or retirement pay incident to his claimed illegal discharge.

## OPINION BELOW

The opinion of the United States Court of Claims decided October 17, 1973, is fully set out in the Appendix annexed hereto (A. 33-75). The Report of the Commissioner to the Court filed on June 5, 1972, is fully set out in the Appendix annexed hereto (A. 1-32), and the Order Denying Petition for Rehearing and Reconsideration is set out in the Appendix annexed hereto (A. 76).

## JURISDICTION

The opinion of the United States Court of Claims was entered October 17, 1973. A timely filed Petition for Rehearing was denied on January 23, 1974, and this Petition for Writ of Certiorari was filed with the Court within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255 (1).

## QUESTIONS PRESENTED

The questions presented by this case are as follows:

I

WHETHER A DULY CONSTITUTED SELECTION BOARD IN CONSIDERING PETITIONER'S PROMOTION TO LIEUTENANT-COMMANDER MAY RELY UPON HEARSAY, GENERAL REPUTATION AND OTHER MATTERS NOT CONTAINED INPETITIONER'S "RECORD" AS DESIGNATED BY TITLE 10 U.S.C., SECTION 5706?

II

WHETHER THE ACTIONS OF A SELECTION BOARD IN CONSIDERING PETITIONER'S PROMOTION TO LIEUTENANT-COMMANDER BASED UPON A RECORD THAT DOES NOT FAIRLY PORTRAY PETITIONER'S RECORD, HEARSAY AND GENERAL REPUTATION ARE INVALID, AS A CONSEQUENCE OF SUCH ACTIONS BEING VIOLATIVE OF PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

Section 1. *Privileges and immunities.*

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...."

10 U.S.C., Section 5031. *Secretary of the Navy: responsibilities; compensation*

"(a) There is a Secretary of the Navy, who is the head of the Department of the Navy. He shall administer the Department of the Navy under the direction, authority, and control of the Secretary of Defense.

"(b) The Secretary of the Navy shall execute such orders as he receives from the President relative to--....

"(3) all matters connected with the Department of the Navy.

"(c) The Secretary of the Navy has custody and charge of all books, records, and other property of the Department."

10 U.S.C., Section 5702. *Navy staff corps officers: promotion and continuation on the active list.*

"(a) The Secretary of the Navy shall convene the following selection boards to recommend staff corps officers, other than women officers appointed under Section 5590 of this of this title, for promotion and for continuation on the active list:...

"(2) A board for each corps, other than the Medical Service Corps and the Nurse Corps, and for each grade, as appropriate, to recommend commanders, lieutenant commanders, lieutenants and lieutenants (junior grade) for

promotion to the next grade, each consisting of not less than six or more than nine officers serving in the grade of captain or above."

10 U.S.C., Section 5706. *Information furnished to Boards*

"The Secretary of the Navy shall furnish the appropriate selection board with--

"(1) The number of line officers of the Navy not restricted in the performance of duty,...that the board may recommend for promotion to the next higher grade;...

"(4) The names of all officers eligible for consideration for promotion to each grade to which the board will recommend officers for promotion;...

"(11) The names of all officers in the promotion zone under consideration; and

"(12) The records of all officers whose names are furnished to the board."

10 U.S.C., Section 5707 *Officers to be recommended for Promotion or Continuation.*

"(a) Of the officers considered for promotion by a selection board convened under this chapter, the board shall recommend for promotion, as appropriate--

"(1) Those eligible male officers on the active list in the line of the Navy or on the active list of the Marine Corps whom the board considers best fitted for promotion;...

"(g) The status of having once failed of selection for promotion to a grade shall not prejudice an officer with respect to his qualifications; his fitness for the naval service, or his eligibility for selection for promotion to that gradeby the next succeding selection board.

"(h) The total number of officers that may be Recommended for promotion in any grade may not exeed the number furnished the board concerned by the Secretay of the Navy under Section 5706

of this title. The number of officers that may be recommended for continuation on the active list by a board convened under this chapter may not exceed the number furnished the board concerned by the Secretary under Section 5706 of this title.

"(i) No officer may be recommended for promotion or for continuation on the active list unless he receives the recommendation of at least two-thirds of the acting members of the board concerned. However, a board composed of five acting members or less may so recommend an officer upon the concurrence of a majority of its members."

10 U.S.C., Section 6382. *Regular Navy, lieutenants and lieutenants [junior grade]; Regular Marine Corps, captains and first lieutenants; discharge for failures of selection for promotion; severance pay*

"(a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, and each officer on the active list of the Marine Corps serving in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time...."

## STATEMENT OF THE CASE

Petitioner, George H. Brenner, filed his complaint in the United States Court of Claims in which complaint he sought recovery of backpay and retirement pay contending that he had been improperly and illegally passed over for promotion by two successive lieutenant-commander selection boards; and accordingly, he received a statutory discharge pursuant to Title 10 U.S.C.,Section 6382.

The trail judge, Commissioner C. Murray Bernhardt, in his report to the Court dated June 5, 1972 (A. 1-32) found in favor of Petitioner and recommended a proper measure of damages to be awarded pursuant to the rules of procedure of said Court.

Respondent took an exception to the findings of Commissioner Bernhardt and the Court of Claims in an opinion written by Judge Skelton, joined in by two other judges, and concurred in by Judge Nichols (in which opinion three judges dissented) rejected the report of the Commissioner to the Court and rendered its opinion dated October 17, 1973 (A. 33-75) denying the Petitioner the relief he sought.

Petitioner was a lieutenant in the United States Navy with over 10 ½ years of active duty service who was honorably discharged effective June 7, 1968, after having been passed over for promotion to lieutenant-commander by two successive selection boards. As a consequence of the discharge, proceedings in the Court of Claims were brought seeking recovery of both active duty and retirement pay. Petitioner has at all times contended that his pass-overs for promotion to lieutenant-commander and the mandatory discharge under 10 U.S.C., Section 6382 were arbitrary, capricious and contrary to law.

Trial Judge Bernhardt in his opinion filed June 5, 1972, crystalized Petitioner's contentions with the following language:

> "Rather it is primarily a proceeding to void plaintiff's pass-overs by the two Selection Boards because they are alleged to have improperly considered with relation to plaintiff's promotion prospects certain derogatory material which should not have been before them, material which might warp their judgment. The derogatory material related to the Board of Investigation record and its sequelae, but characterization of those procedural fractures as violative of due process is not essential in passing on the propriety of the Selection Boards having access to such biasing information in pondering plaintiff's promotion deserts. Consideration is therefore confined to the latter issue, with unavoidable references to the nature of the prejudicial material which was improperly before the Selection Boards, and how it got there."

Petitioner, born August 25, 1935, served in the United States Marine Corps Reserve from August 29, 1952, graduated from high school in 1954, and from active duty in the Marine Reserves won a competitive appointment to the United States Naval Academy, Annapolis, Maryland, standing within the top 160 authorized competitive appointments for enlisted members of the United States Navy and Marine Corps Reserves. He graduated from the Academy on June 4, 1958, with a Bachlor of Science degree, and was commissioned as an ensign. He was promoted to lieutenant (j.g.) on December 4, 1959, and to lieutenant on March 25, 1967 (effective retroactively to June 1, 1962). He was honorably discharged effective June 7, 1968.

During his naval career he was assigned sea duty on several destroyers and guided missile frigates, serving successively as anti-submarine warfare officer, gunnery officer, missile officer, assistant weapons officer, and weapons officer. He also had shore assignments as Training Program Manager for the Navy's Terrier Guided Missile Program, Dam Neck, Virginia, for 2 years, was stationed at the Bureau of Naval Personnel (BuPers) in Washington, D.C., on the Navy's Surface-to-Air Guided Missiles Systems, and in December 1969, he commenced what was expected and eventually proved to be a terminal assignment with the Navy Sub-Board of Inspection and Survey at Newport, Rhode Island. This assignment was not "career-enhancing" and was commonly regarded as a "twilight tour," to which line officers when assigned rightfully felt their naval careers were about to end. During his naval service, Petitioner received various commendations, honors and praise.

Petitioner was assigned as weapons officer to the U.S.S. Luce, a guided missile destroyer then under the command of Comdr. Lademan, reporting there May 23, 1965. On January 19, 1966, while Luce was anchored at Mayport Naval Air Station, Florida, a nuclear-armed surface-to-air guided missile known as the Terrier was dropped on the deck of the Luce from a height of several feet while being routinely handled. The Terrier is 27 feet in length and 1 ½ tons in weight. The missile

did not explode. Demolition crews removed it. There were no injuries. There was considerable publicity over the accident because of its potential consequences, although the Navy officially reported that because of the construction of the Terrier there was no risk of any explosion. As weapons officer, the Petitioner had technical responsibility for the incident, whether or not he was negligent, according to the military rule of command responsibility.

Several official investigations were conducted of the missile accident circumstances. One was by Comdr. Lademan, commanding officer of the Luce, assisted by Lt. Comdr. Kosmela, his executive officer. Another was by the Bureau of Weapons. Another by the Bureau of Ships. The principal investigation was by an Informal Board of Investigation.

At the instance of Admiral Ruckner, an Informal Board of Investigation convened January 22, 1966, and adjourned February 17, 1966. The Board consisted of three members (Capt. Schremp as senior member, assisted by Capt. Upshaw and a third member). The Board had subpoena power and authority to swear witnesses. A number of officers and enlisted personnel aboard the Luce testified in camera. The Petitioner was not present or represented at their testimony. Comdr. Lademan was present throughout the Board sessions. Petitioner appeared voluntarily before the Board on Saturday, January 29, 1966, and testified at great length until fatigued when the Board recessed at 11:00P.M.

At the resumption of the Board proceeding on February 9, 1966, the Petitioner was called as a witness. On advice of counsel, Petitioner declined to testify. After a violent exchange between the Board and Lt. Olson (and the latter's request to refer the question to the convening authority) which Capt. Schremp refused to do, a Board member (Capt. Upshaw)is said to have told Lt. Olson, in effect: "Here's a nickel, where are your brains; here's a nickel, go call JAG." Outside the hearing room Capt. Schremp, senior member of the Board, handed a

telephone to Lt. Olson with the reported direction : "Here, your boss wants to talk to you." Whereupon Olson talked on the teleplone to his immediate superior. Schremp stayed a few minutes and was annoyed, The Board then reconvened. Petitioner did not testify, but he and his counsel attended the remaining Board sessions until it adjourned February 17, 1966. On that date, the Petitioner's security clearance was terminated.

Comdr. Lademan was also a party to the investigation and attended all of the Board sessions represented by counsel. He was selected for a "due course" promotion to captain by the Selection Board that met in the late summer of 1966, having not been passed-over by any prior Selection Board. His executive officer, Lt. Comdr. Kosmela, was also promoted to commander in 1966.

Some time prior to May 11, 1966, the Board recommended that Petitioner be issued a punitive letter of admonition relative to eight alleged specified derelictions in the performance of his duty.

On May 11, 1966, Admiral Ruckner, the convening authority for the Board of Investigation, sent Petitioner a letter of censure in the degree of admonition. The letter referred to the missile mishap investigation and listed four personal derelictions on Petitioner's part as weapons officer (reduced from eight derelictions recommended by the Board), none of which expressly referred to the missile accident which had precipitated the Board proceeding. The letter admonished Petitioner -- "For such negligence in the performance of your duties" -- advised him of his right to appeal the action within a reasonable time (set at 15 days after receipt of the letter in the absence of unusual circumstances), and advised that a copy of the letter would be placed in his official record in BuPers unless withdrawn or set aside by higher authority. Petitioner was also advised of his right, within 15 days after final determination of any appeal, to submit for inclusion in his record at BuPers such statement concerning the letter of censure as he might desire.

The letter concluded:

> "Your reporting senior is required to make notation of this letter in your fitness report submitted next after the issuance of this letter has become final, either by decision of higher authority upon appeal or by your decision not to appeal."

On January 28, 1967, Admiral Ruckner wrote to the C-in-C, U.S. Atlantic Fleet that, based on plaintiff's appeal, he had set aside the punitive letter of censure, and requested that the copy of the letter of censure forwarded to the C-in-C previously be destroyed or returned to the originator, namely, himself. On February 9, 1967, the C-in-C, U.S. Atlantic Fleet, advised Admiral Ruckner by letter that the letter of censure had been destroyed as requested.

Also on January 28, 1967, Admiral Ruckner wrote to the JAG, with copy to Petitioner, advising that Petitioner's appeal "presents substantial new evidentiary matters that are in conflict with the evidence before the board" and which, had they been available earlier, "the punitive letter may not have been issued." The new matters, said Admiral Ruckner, "do mitigate the derelictions alleged," and therefore he "has set aside the letter of admonition and issued a letter of instruction to Lt. Brenner." Finally:

> "Additionally, (I) consider that the investigation, as the case of Commander Dixon M. Lademan . . . should be made a matter of interest in the official record of Lt. George H. Brenner."

No copy of this letter to JAG was sent to C-in-C, U.S. Atlantic Fleet.

The Board record is calssified as "Secret" and a copy is in the custody of JAG along with all sequential endorsements, including references to Admiral Ruckner's letter of censure to Petitioner, his withdrawal thereof and substitution of a letter of instruction, and his request to JAG to deposit the entire package

in Petitioner's official record as a "matter of interest." It is not disclosed when the records were transmitted by JAG to BuPers, but it must be concluded that they were so transferred sometime after January 28, 1967, because on January 31, 1968, one year later, the Chief of Naval Personnel caused an endorsement to be attached thereto, which recited the instructions of January 28, 1967, received by JAG from Admiral Ruckner and stated as follows:

> "...However, lacking a supplementary investigation to reconcile the evidentiary matters in conflict, it is not considered appropriate to hold this investigation as a matter of interest in the official records of either CDR Lademan, the CO of LUCE, or LT. BRENNER. ..."

Also on January 28, 1967, Admiral Ruckner wrote to Petitioner stating that the proceedings of the Board were in substantial compliance with the JAG Manual requirements for an informal investigation, but that the substantial new evidentiary matters presented in Petitioner's appeal mitigated the dereliction alleged and would have possibly averted action of a punitive nature if such matters had been available to the Board. Therefore, Admiral Ruckner advised Petitioner that he had set aside the letter of censure previously issued Petitioner, and stated as follows:

> "Nevertheless, it is apparent that there were deficiencies in the Weapons Department on board USS LUCE (DLG 7) and that as Weapons Officer you were responsible for the proper administration of this department. Although the circumstances as now presented do not warrant punitive action, it is considered that your performance prior to the incident involved was deficient. Your are, therefore, to take the contents of reference (b) (the letter of censure) as a caution, not in the sense of Article 15, UCMJ, but merely instructional in nature. Reference (b) (the letter of censure) will not be made a part of your official record and will not be forwarded to higher authority. Its sole purpose is the improvement of your performance of duty."

At this time the Petitioner was no longer under Admiral Ruckner's command. Note, that on December 2, 1966, Admiral Ruckner had indirectly commended Petitioner.

Also note, that on the same day, January 28, 1967, Admiral Ruckner had ordered JAG to deposit the Board record in Petitioner's official record as "a matter of interest." Ruckner also requested that JAG make Ruckner's letter to JAG a part of the Board of Investigation record.

While stationed with the Navy Sub-Board of Inspection and Survey at Newport, Rhode Island on his final tour of duty before discharge (commencing December 1966), the Petitioner was told by Admiral Ruckner's senior legal officer (whose name Petitioner could not recall) that Admiral Ruckner was told by his higher command to "squash" the letter of censure issued to Petitioner because of evidence that had been allowed in the Board investigation. He is said to have apologized to Petitioner and to have said in effect, "it is just unfortunate that you were at the wrong place at the wrong time."

An official communication from Navy JAG dated August 11, 1971, and placed in evidence by the government states as follows:

> "The letter of admonition (i.e., letter of censure in the degree of admonition) which would have been awarded as non-judicial punishment (10 U.S.C. 815) was, as Commander Cruiser-Destroyer Force U.S. Atlantic Fleet stated in his endorsement, withdrawn by him and no record that it had ever been awarded remains in any record.the letter of instruction issued in its place would of necessity be non-nonpunitive (sic) and therefore would not appear as such in Lieutenant Brenner's record. The original was undoubtedly delivered to Lieutenant Brenner with no other distribution of copies."

This statement by JAG is obviously ambiguous and not reliable.

Its concluding sentence is contradicted by the letter of instruction issued to Petitioner on January 28, 1967, which reflects distribution of a copy to the C-inC U.S. Atlantic Fleet, despite JAG's representation that no one but Petitioner received the letter of instruction. Note also, that the JAG statement merely says in effect that the letter of instruction of necessity would not appear in Petitioner's record because it was nonpunitive in nature and JAG procedure was not to keep such documents, but the statement does not say that a search was made for it. As a matter of fact, joint exhibit No.2, an affidavit of January 6, 1971, by the custodian of JAG's records, makes it clear that all of the Board of Investigation record and its sequential endorsements were at all times on file with JAG.

On February 20, 1967, the Petitioner's individual counsel (his father) wrote to the JAG complaining that Admiral Ruckner had, in violation of JAG Manual provisions, directed JAG to include the Board record in Petitioneer's official record as a matter of interest, after having asked the C-in-C U.S. Atlantic Fleet to destroy the letter of censure (which was done). The letter requested that the Board record reflect that the letter of censure was set aside, that the Board record not refer to the issuance of a nonpunitive "letter of instruction," and that the board record not be made a matter of interest in Petitioner's official record as Admiral Ruckner had ordered. No reply was ever forthcoming to this inquiry.

In May 1966 complete copies of the Board of Investigation record (including first endorsement) were sent by Admiral Ruckner to JAG, BuWeapons, Ship Missile Systems Engineering Station, Naval Weapons Evaluation Facility, and the commanding officer of the Luce. Also in May 1966, Admiral Ruckner sent a copy of the first endorsement to the Board of Investigation record, only, to the Commander of Cruiser-Destroyer Flotilla Six, Commander Destroyer Squadron Eight; and to the senior member of the Board of Investigation (Capt. Schremp). The first endorsement indicated that a letter of censure had been issued to Petitioner. The Board of

Investigation record, etc., were lodged with BuPers from sometime after January 28, 1967, until at least January 31, 1968.

The members of the Lieutenant Commander Selection Boards considering Petitioner's promotion were for the most part chosen from the Commands and Sections to whom copies ofthe Board of Investigation Record had been disseminated. As indicated included within the aforesaid documents was the letter of censure issued to Petitioner and that was available to the "Missile Navy" although this letter of censure was ultimately set aside as a result of the Appellate relief sought and obtained by Petitioner. The uncontroverted evidence before the trial Judge was to the effect that the record was distributed to the"Missile Navy" for their evaluation and for instructional purposes in order to obviate the happening of such an incident again.

The Lieutenant Commander Selection Boards were given Petitioner's record which included fitness reports prepared during the course of his naval career.

Of all the comments contained in Petitioner's fitness reports, the least flattering were those on Petitioner's fitness report for the period July 1, 1965-February 19, 1966, by Comdr. Lademan. This is the period during which the missile incident of January 19,1966, and the Board inquiry of January, February 17,1966, occurred, in which both Petitioner and Comdr. Lademan were named as Parties. This particular fitness report was furnished Petitioner on May 19,1966, by BuPers, and his comments were invited. Petitioner, who was then at sea on a protracted cruise aboard the Luce, responded on September 11, 1966, with a lengthy rebuttal of Comdr. Lademan's derogatory comments. The Petitioner was then aware that he was scheduled for promotion by the Selection Board and he was discouraged over the potential effect of the fitness report in question on his naval career. A response by Comdr. Lademan on October 6, 1966, defending his fitness report evaluation of Petitioner, commends the Petitioner's industry, and criticizes

his proneness to antagonize others, a weakness in which Comdr. Lademan had observed an improvement. (Note that the Petitioner's Selection Board met September 27 to November 10, 1966, and Petitioner's explanation of September 11 and Lademan's response of October 6 were not received by BuPers until October 11, so there is some question as to what opportunity the Selection Board had to see these communications before passing-over Petitioner.)

The only reference in Petitioner's file of fitness reports to the subject of the Board proceeding was in the fitness report by Comdr. Drake for the period February 20, 1966-June 30, 1966, in which the rating officer observed that "During a major part of this period Lt. Brenner has been affected by his prior participation in an investigation to which he was a party, and in which he feels apparently that he was done a grave injustice.

Petitioner was considered but not recommended for promotion to lieutenant-commander by a Selection Board which met from September 21 to October 22, 1965. This was not considered a "pass-over" on Petitioner's record, since he was below-the-promotion-zone on that occasion.

A Selection Board for the recommendation of line officers of the Navy for temporary promotion to lieutenant-commander met from September 27 to November 10, 1966. The Board consisted of eight members and 14 alternate members, all of them captains. Junior officers were appointed as recorder and assistant recorders. The "precept" convening the Board gave a quota of 324 promotions to lieutenant-commander, with limits as to certain categories, and stated that "The fact that an eligible officer is above, within, or, below the promotion zone is immaterial to the determination of whether that officer meets the criteria established by law for his category." However, a limit of 5 percent was imposed for promotion of officers below the promotion zone. Eighty to 90 percent of the candidates before the 1966 Selection Board were recommended for promotion. Petitioner was passed-over. A graduate of the

Naval Academy would normally be given preference by the Selection Board for promotion, all other things being equal, although this factor was not as influential as in prior years.

The next Selection Board for the lieutenant-commander promotion list met from October 3 to November 21, 1967. It was composed of eight members and 14 alternate members, all captains. Its quota of promotions was 943. As in the case of the 1966 Board, a limit of 5 percent was imposed on the number of officers recommended for promotion who had been passed-over once before. The 1967 Board recommended 80 to 90 percent of the candidates for promotion. Petitioner was again passed-over. Under 10 U.S.C. Section 6382 a second pass-over for lieutenant-commander selection automatically results in separation the next succeeding June 30.

A Captain Meyer was an alternate member of Petitioner's 1967 Selection Board. Meyer was known to Petitioner by reputation as an officer considered to be an authority in naval missiles and one who was familiar with the missile accident on the Luce because he had been involved in the investigation of the accident for BuWeapons. By affidavit in the record Meyer conceded that he had participated in the investigation of the Luce accident, but denied having seen a copy of the report of the Board of Investigation concerning it, or having known of any consequences therefrom to Petitioner.

Lt. Comdr. Saunders was a witness called by Petitioner. For the last 9 years of his naval service (until 1968) he was head of the Fitness Report Branch, BuPers. He was in charge of 45 civilians who administered the Navy's program of Officer Performance Evaluations. During that period he briefed every Navy Selection Board that met, that is, he explained the documents furnished them concerning the candidates for promotion on each list, primarily the fitness report file jacket and brief sheet which was a worksheet condensed from the fitness report file jacket, and instructed the Board how to use this material in their evaluation process. The file of each

candidate for promotion was screened by Comdr. Saunders' staff to insure that the record of fitness reports was complete. Each jacket would contain, in addition to the individual's fitness reports, all letters of commendation, censure, disciplinary action, and "anything coming out of an investigation, any action, derogatory action, that resulted in an investigation would logically be reflected in the Selection Board jacket." Fitness reports are of prime importance to the Selection Board in passing on promotions; the other contents of the file jacket are of secondary importance since the fitness reports should reflect anything of a derogatory nature, the specifics of which should be found elsewhere in the file jacket.

Lt. Comdr. Saunders testified that Petitioner's second Selection Board would know that Petitioner had been passed-over by the first Board because of his "lineal position" on the roster of candidates, arranged according to dates of rank. Although the fact of having been passed-over by one Board should not influence the individual's selection on his next Board, as a practical matter he is more likely than not to be passed-over by the second Board because the derogatory information in his file which caused the first pass-over is still in his file. Only a small percentage of officers with one pass-over succeed the second time.

Petitioner's pass-over problem is somewhat unusual because there are not many officers on a promotion list who are subjects of an investigation in process but not completed at the time of Board action. The investigation of the missile mishap on the Luce was technically completed February 23, 1968, so it was pending during both the 1966 and the 1967 Selection Board meetings.

The only reference in Petitioner's fitness reports to his involvement in an investigation was the fitness report for the period February 20, 1966-June 30, 1966, which comments on Petitioner's participation in an investigation. Other references to Petitioner's involvement in that proceeding which were in the

documents before the Selection Boards were (1) the letter of October 2, 1967, by Admiral Reich in Petitioner's behalf to the 1967 Selection Board, and (2) the Security Termination Statement of February 17, 1966, which was in Petitioner's personnel file before both Selection Boards. Comdr. Saunders said that if a Selection Board member had noticed these references concerning Petitioner, he could have asked him (Comdr. Saunders) to produce the Board of Investigation record for the Board to examine in evaluating Petitioner's candidacy for promotion. Since the Petitioner was issued a letter of censure in May 1966 and his first Selection Board convened in September 1966, Comdr. Saunders said "I would think that it was likely" that the Board had before it the letter of censure, since the investigation report is considered complete at the time the letter of censure is issued. Comdr. Saunders believed that a letter of instruction is normally made a matter of record for inclusion in the promotion candidate's file jacket before the Selection Board, but he was not certain of that. If a letter of censure were in a candidate's record before a Selection Board "Of course, it would have a derogatory inference as any critical or derogatory or low mark would have." He stated further: "***There's some question as to whether or not the (Selection) Board might have had knowledge about it (the Board of Investigation proceeding to which Petitioner was a Party) and you can't pin this down.***"

According to Comdr. Saunders, Board of Investigation reports as to completed investigations involving a promotion candidate, deposited with JAG as a "matter of interest", were routinely made available to Selection Boards. It is clear that JAG had on file at all times a complete copy of the Board of Investigation record, and also a letter of January 28, 1967, from Admiral Ruckner referring to the fact that a letter of instruction had been issued to Petitioner.

A "Security Termination Statement" dated February 17, 1966 (at the conclusion of the Board of Investigation proceeding) was issued to Petitioner. It refers specifically to the

Informal Board of Investigation to which Petitioner was a party. This statement was available to Petitioner's Selection Boards.

While it is known that fitness reports are the prime basis of the Selection Board's recommendation, the description of other data of a prejudicial nature which the Board may have considered or known about is not ascertainable since the reasons for denial of promotion are not set forth and the Board proceedings are secret. It does appear quite evident that as a consequence of the broadcast of copies of the Board of Investigation record throughout the "Missile Navy" by Admiral Ruckner in May, 1966, coupled with the references in the documents before the Selection Boards of Petitioner's involvement in a Board of Investigation inquiry to a point of having been designated a party to that investigation said Board of Investigation record and inquiry came to the attention of his Selection Boards to Petitioner's detriment.

Finally, of subtle effect on the 1967 Selection Board would be its knowledge that in December 1966, Plaintiff had been assigned to a "twilight tour" at Newport, Rhode Island, which is not considered a "career-enhancing" assignment for a line officer, which would be recognizable as such by the experienced naval captains who compose the Selection Board. It certainly served as a tell-tale clue to the Board that Petitioner's superiors were grooming him for separation, even before his consideration by the second Selection Board.

On December 6, 1967, after having been passed-over by the second Selection Board and having been transferred to a Navy Sub-Board of Inspection and Survey at Newport Naval Base, Petitioner requested an early discharge and a commission in the Naval Reserve. Petitioner knew that the other officers assigned to that inspection duty had been passed-over once or more for promotion, and that such assignments were deliberately given to officers whose naval careers were coming to an end due to lack of promotion prospects. Comdr. Saunders

verified that the assignment of an unrestricted line officer (such as Petitioner) to an inspection service would not enhance his career prospects. Petitioner was honorably discharged June 7, 1968.

## REASONS FOR GRANTING THE WRIT

The qualification for review on certiorari, as specified in Rule 19 of this Court, are abundantly and compellingly fulfilled by the case at bar.

### I. — II.

> The holding of the United States Court of Claims in sanctioning rank hearsay, general reputation and incomplete documentation to come before a lieutenant-commander's Selection Board whose deliberations are secret when it is considering the promotion of a naval officer is in conflict with a prior decision of that Court, the due process provisions of the Fourteenth Amendment of the United States Constitution and is also, in effect, an invitation to this Court to decide an important question of Federal law which has not but should be decided by this Court.

In the detailed statement of the case which is predicated upon the findings of fact in the report of the trial Judge and the opinion of the United States Court of Claims, it is self-evident that the record before the Court of Claims contained highly prejudicial and inflammatory matter dealing primarily with Petitioner's participation in a Board of Investigation as a party. Also, as has been previously noted, the scathing and critical fitness report by Comdr. Lademan, coupled with his response of October 6, 1966 defending his fitness report of evaluation of Petitioner were all apparently before the Board; although there is some question whether Petitioner's explanation and comments addressed to that fitness report of September 11 and Comdr. Lademan's response of October 6, all of which were not received by BuPers until October 11, were actually before

the lieutenant Commander's Selection Board.

Of equal importance is the fact that in the fitness report submitted by Comdr. Drake for the period February 20, 1966-June 30, 1966 there is reference to Petitioner's participation in an investigation, and the "Security Termination Statement" dated February 17, 1966 unquestionably brought to the attention of the lieutenant commander's Selection Boards Petitioner's substantial participation in a Board of Investigation inquiry.

The distribution throughout the Missile Navy for educational purposes of the record of the Board of Investigation might have served the Navy well. But the inclusion in that record of the letter of censure issued to Petitioner which was ultimately set aside, which fact was not a part of the disseminated record, coupled with the fact that the officers chosen to be members of the lieutenant-commander's Selection Board came from those branches of the Navy to which the record of the Board of Investigation was distributed, coupled with the further fact that the incident involving Petitioner was well known throughout the "Missile Navy" unquestionably brought before the lieutenant-commander's Selection Boards rank hearsay and Petitioner's reputation which are not a part of the records to be considered by the Selection Boards as provided by Title 10, Section 5706 (12) as that Statute and Section are defined in Article B-2201 of the Bureau of Naval Personnel Manual in effect at the time of Petitioner's consideration for promotion by the lieutenant-commander's Selection Boards. (A 77-78)

The very Court that sanctioned the actions of the lieutenant-commander's Selection Boards in question previously rendered an opinion in *Weiss v. United States*, 187 Ct. of Cl. 1, 408 Fed. 2d 416 (1969) which opinion cannot in any was be reconciled with the opinion below nor with due process of law. The Court in *Weiss* at page 419 held as follows:

> "Selection Boards have and must have wide discretion in performing their duties. We do not think the courts are or should be in the "promotion business". But the selection procedure must follow the law. The documents which are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record. If a Service Secretary place before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes. We cannot endorse the way the law was complied with here, but do not find it necessary to decide the case on illegality at that stage, so we do not condemn it as the BCNR did. (The Board for Correction of Naval Records had recommended that Weiss' records be corrected to reflect that he was not reported unsatisfactory by the Selection Board, but the recommendation was disapproved by the Under Secretary of the Navy)."

Judge Davis in a seperate concurring opinion stated that he "would go further and hold explicitly that the Selection Board's action was invalid because it did not have the proper statutory record before it."

On pages 5, 6 and 7 of the Report of the Commissioner to the Court (A 5-7) the Commissioner delineates the fact pattern herein comparison to the fact pattern in *Weiss, supra.*,and concludes, as any fair-minded Judge must, that the facts herein are more flagrant that the facts in *Weiss*. The foregoing is particularly true when you consider the fact that as a consequence of Petitioner's "twilight assignment" and his lineal ranking before the second lieutenant-commander's Selection Board, as a consequence of which they knew he had once been passed-over, Petitioner had no chance or opportunity whatsoever to compete on an equal basis with the other persons being considered for elevation to the rank of lieutenant-commander.

In summary, although Federal Courts are neither permitted nor equipped to interfere with the discretion of military Selection Boards in their recommendation for or against the promotion of officers, in their promotion proceedings extreme care must be exercised to observe scrupulously applicable military conventions designed to shield from view by the Boards any material of a derogatory or prejudicial nature in the record of the individual candidate for promotion flowing from an investigation which is incomplete or procedurally defective. In these rare instances the Court may void the action of the Selection Boards for critical procedural irregularity, for in competing with his peers for promotion in the service the individual officer is entitled to be judged on the basis of a record free from bias and distortion consistent with the dictates of due process of law and equal protection of the law as set out in the Fourteenth Amendment of the Constitution.

## CONCLUSION

The decision below departs radically from Constitutional principles and from both substantive and procedural judicial precedent. The matter involved is of extreme general and national significance. The questions presented have not been, but should properly be, conclusively determined by this Court. The holding below cannot be reconciled with those of the United States Court of Claims nor of this Court in dealing with due process and equal protection propositions.

The maintenance of uniformity in the administration of justice and the promotion of naval officers as enforced and applied by the United States Court of Claims and Federal Courts generally is jeopardized by the decision below. For all of the reasons listed above, it is most strenuously urged that this Court exercise its discretion and grant the writ.

LEVINE, FREEDMAN & HIRSCH, P.A.

By s/ Arnold D. Levine
Arnold D. Levine
725 East Kennedy Boulevard
Tampa, Florida 33602

Attorneys for Petitioner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Rule 33 of the Rules of this Court, on the 22nd day of April, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, and three additional copies were mailed to Honorable Thomas J. Lydon, Chief, Court of Claims Section, United States Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

s/ Arnold D. Levine
Arnold D. Levine

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-

GEORGE H. BRENNER,

*Petitioner,*

*v.*

THE UNITED STATES OF AMERICA,

*Respondent.*

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

# In the United States Court of Claims

No. 296–68

(Filed JUN 5 1972 )

GEORGE H. BRENNER v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*

*Arnold D. Levine*, attorney of record, for plaintiff. *Levine & Freedman, P.A.*, of counsel.

*Charles M. Munnecke*, with whom was *Assistant Attorney General L. Patrick Gray, III*, for defendant.

## OPINION

BERNHARDT, *Commissioner:* When in January 1966 a nuclear-armed Terrier surface-to-air missile was accidentally—though without real danger—dropped onto the deck of the *U.S.S. Luce* while being routinely handled, it did more than scare the Florida harbor where it happened and dent the deck and the missile. It also wrecked the promising career of a young naval lieutenant who had in the 8 years from his Annapolis graduation won a number of official kudos for his outstanding services as weapons officer aboard several destroyers and faced a good future, although his prickly personality and impulsive nature caused him to register mixed reviews in his periodic fitness reports which were splendid where they mattered most but uneven as to certain correctable personality traits. Reverberations of an informal Board of Investigation

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 134(h).



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convened promptly to investigate the mishap, and its findings against plaintiff, improperly reached the well-tuned ears of the Selection Board which met later the same year to consider plaintiff's promotion, as well as another the year following, so that plaintiff, although having secured after the first pass-over the withdrawal of a letter of censure resulting from the inquiry, was passed-over again for promotion to lieutenant-commander and was discharged in 1968 because under applicable law (10 U.S.C. § 6382) two-time losers before the Board have no naval future. Promotion tolerates no blemish—within reason—on one's naval record.

The plaintiff contends that his pass-overs for promotion to lieutenant-commander by two successive Selection Boards, which made discharge by the following June 30 mandatory under 10 U.S.C. § 6382, were arbitrary, capricious, and contrary to law. He also contends that in the course of his appearance before a Board of Investigation by which he was tardily designated as a Party in Interest, the Board's proceedings, its recommendations, the issuance of a punitive letter of censure in the degree of admonition by the convening authority, the difficulties unfairly imposed on his efforts to obtain a time extension to appeal from the letter of censure, the ultimate withdrawal of the letter of censure and its substitution by an equally damaging letter of instruction for lodging in his official records, and the publicizing of these records by actions of the convening authority, violated his rights to due process guaranteed by applicable provisions of the Manual of the Judge Advocate General and of the Uniform Code of Military Justice.

These matters are itemized in the accompanying report of facts, but the particular relevance of the plaintiff's due process contention, especially as to the Board of Investigation phase, is not apparent. From inspection of the cited provisions of the manual in plaintiff's brief, and according to due process benchmarks in Board of Investigation proceedings as interpreted by this court in *Conn* v. *United States*, 180 Ct. Cl. 120, 376 F. 2d 878 (1967), and *Cole* v. *United States*, 171 Ct. Cl. 178 (1965), it is probable that the plaintiff is correct in his contentions as to this due process issue. However, this is not an illegal discharge proceeding per se where due process violations would be germane and controlling. Rather it is

primarily a proceeding to void plaintiff's pass-overs by the two Selection Boards because they are alleged to have improperly considered with relation to plaintiff's promotion prospects certain derogatory material which should not have been before them, material which might warp their judgment. The derogatory material related to the Board of Investigation record and its sequelae, but characterization of those procedural fractures as violative of due process is not essential in passing on the propriety of the Selection Boards having access to such biasing information in pondering plaintiff's promotion deserts. Consideration is therefore confined to the latter issue, with unavoidable references to the nature of the prejudicial material which was improperly before the Selection Boards, and how it got there.

As long ago as *Reaves* v. *Ainsworth*, 219 U.S. 296 (1911), as explicitly as *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), *Norman* v. *United States*, 183 Ct. Cl. 41, 392 F.2d 255 (1968), *cert. denied* 393 U.S. 1018 (1969), *Clinton* v. *United States*, 191 Ct. Cl. 604, 423 F. 2d 1367 (1970), *Arnheiter* v. *Chaffee*, 435 F. 2d 691 (9th Cir. 1970), and *Payson* v. *Franke*, 282 F. 2d 851 (D.C. Cir. 1960), and as recently as *Muldonian* v. *United States*, 193 Ct. Cl. 99, 432 F. 2d 443 (1971), the Federal courts have held in forthright terms and under varying factual contexts that they have neither power nor inclination to review military discretion in failing to assign, commission, or promote officers because, as stated in *Orloff* v. *Willoughby*, *supra*, at 93, 94:

> * * * judges are not given the task of running the Army. * * * The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. * * *

The given reason for this hands-off policy is particularly valid with respect to the recommendations of Selection Boards for officer promotions, for the record of an individual on the list of eligible candidates is to be contrasted with similar records of the often hundreds of other candidates on the same list. "* * * The criteria [*i.e.*, for promotion] were for the board in its sworn judgment to apply for the good of the

service. Suffice it to say that we are in no position to assess and appraise that record by itself even were we free to do so." *Payson* v. *Franke*, *supra*, at 854.

Selection Boards are composed of carefully chosen senior officers. Precautions are taken to avoid placing in a candidate's file and available for inspection by the Boards' material which is unfairly prejudicial or derogatory to the candidate, such as incomplete investigations to which he is a Party in Interest. The proceedings of Selection Boards are secret. No record is kept as to precisely what data beyond fitness reports and the individual's personnel file the Boards might consult or know about. Restraint is exercised in refusing Board requests for off-limits material for their examination, but hints of trouble in the individual's official record or fitness reports which might prompt requests by the Board for more data can be sufficient in themselves to warrant the Board not to take the risk of recommending a man for promotion who has a question-mark in his dossier.

The reluctance of the judiciary to review the promotion actions of Selection Boards is rooted not only in the court's incurable lack of knowledge of the total grist which the Boards sift, but also in a preference not to meddle with the internal workings of the military. The latter would not be sufficient by itself to deter judicial review, for with great frequency this and other Federal courts entertain claims based upon illegal discharges, failure to award disability retirement pay, and occasionally collateral attacks on court-martial convictions, all of which involve internal affairs of the military services. But in such cases the records available for judicial scrutiny are more finite and identifiable than are the deliberations of Selection Boards in discharging their promotion responsibilities, which are shrouded in mystery and imponderables. In *Ricker* v. *United States*, 184 Ct. Cl. 402, 396 F. 2d 454 (1968), the court set aside the action of a Navy promotion board in failing to continue the plaintiff in service because the board was illegally constituted, a clue as to the court's willingness to review promotion actions for procedural regularity.

Observe *Weiss* v. *United States*, 187 Ct. Cl. 1, 7, 408 F. 2d 416, 419 (1969):

> Selection Boards have and must have wide discretion in performing their duties. We do not think the courts are or should be in the "promotion business." But the selection procedure must follow the law. The documents which are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record. If a Service Secretary place before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes. We cannot endorse the way the law was complied with here, but do not find it necessary to decide the case on illegality at that stage, so we do not condemn it as the BCNR did. [The Board for Correction of Naval Records had recommended that Weiss' records be corrected to reflect that he was not reported unsatisfactory by the Selection Board, but the recommendation was disapproved by the Under Secretary of the Navy.]

The court in *Weiss* then proceeded to find for the plaintiff on the strength of an irregularity in the overruling of the Selection Board's recommendation by the Under Secretary of the Navy, so to that extent the passage quoted above may be considered dicta, but so singularly compelling that to infer that it does not represent the court's deliberate view would be fatuous. The more so when Judge Davis' separate concurring opinion at 15 "would go further and hold explicitly that the Selection Board's action was invalid because it did not have the proper statutory record before it."

In vital respects the facts in *Weiss* parallel Brenner's, if a mite more flagrant. Both were naval officers. A Board of Inquiry recommended adverse action against Weiss for improper currency transactions, and the convening authority—rebuking the Board for its questionable procedures—moderated the Board recommendation by issuing Weiss a letter of reprimand limited to one instead of several recommended infractions, and was later concurred in by the Navy JAG. In Brenner's case, a Board of Investigation, with some obvious irregularities in its procedures, recommended eight derelictions by Brenner over the missile mishap, reduced to an imprecise and vague four by the convening authority in his

punitive letter of censure in the degree of admonition (one degree less than reprimand) which was later withdrawn and substituted by a letter of instruction. Weiss' letter of reprimand, but not the report of his Board of Inquiry, plus an unsatisfactory fitness report based on the investigation, were included in his personnel file, together with his written rebuttal of the fitness report, and were available 5 years later for inspection by a Selection Board which recommended against his promotion to commander, resulting in his mandatory honorable discharge under 10 U.S.C. § 5708(f). In Brenner's case his record before his first Selection Board, meeting later in the same year that he was investigated and censured and his appeal then pending, contained at least two references to the fact that he had been a Party to a Board of Investigation proceeding and his security clearance had been terminated, in addition to a damaging fitness report (with rebuttal by plaintiff) made out 2 days following the close of his Board of Investigation by his commanding officer who himself had been a Party to the same investigation and faced the risk of censure along with plaintiff, as well as possible repercussions in his own Selection Board scheduled that year. (He was promoted.)

The evidence in Brenner's case is somewhat murky as to precisely what material his Selection Boards considered relating to his Board of Investigation participation and the subsequent censure, but the wide distribution of the damaging Board of Investigation record throughout the "missile Navy", the deposit of the entire record and its sequelae with Navy JAG, and submission of that record to BuPers for deposit in plaintiff's official record as a "matter of interest" at the direction of the admiral who had convened the Board of Investigation (although BuPers declined to retain the record after both of plaintiff's successive Selection Boards had passed him over),[1] produces the circumstantial but entirely reasonable conclusion that plaintiff's Selection Boards were sufficiently

[1] Apparently the Chief of Naval Personnel is authorized to exercise his discretion in such matters by C-7801, of BuPers Manual, Change 13, September 9, 1966. Change 16, March 29, 1966, of JAG Manual, § 0101(c), directs that nonpunitive letters of censure are not to be included in the officer's personnel file, and this of course should apply to letters of instruction, a milder form of rebuke.

imbued with derogatory data concerning the plaintiff's Board of Investigation involvement to influence their judgment to the detriment of plaintiff's chances for promotion to lieutenant-commander. If *Weiss* enjoys an advantage over Brenner because his Correction Board recommended erasement of his pass-over, reprimand, and unsatisfactory fitness report (Brenner did not apply to the Correction Board), this advantage is partially offset by the conduct of the convening authority (Admiral Ruckner) in whipsawing plaintiff by arbitrarily denying him time to appeal from the letter of censure, in disseminating copies of the Board of Investigation record throughout the "missile Navy", in smearing the plaintiff's official reputation by withdrawing the letter of censure (obviously because it was procedurally defective) and substituting without authority a letter of instruction which was equally damaging to plaintiff's career, and generally in behaving with relentless hostility to plaintiff. Certain other parallels between Weiss and Brenner are observed in comparing the facts in the *Weiss* opinion and those as to Brenner in the findings of fact following this opinion.

In *Weiss* the court agreed with the Correction Board that the material in Weiss' personnel file that was available to the Selection Board (the reprimand, the unsatisfactory fitness report, and references to his currency transactions, but not the complete Board of Inquiry report) were unduly prejudicial to him. In *Weiss*, as in Brenner's case, there was some degree of uncertainty as to exactly what materials were before the Selection Board, just as in each case it is indicated that the Selection Board did not know to what extent the investigations of the subject officers had been discredited. Thus the common vice in each case is the presence before the Selection Boards of derogatory material that should not have been there. Under these circumstances the voiding of the pass-overs on judicial review does not do violence to the traditional hands-off policy of courts described earlier, for it is based on irregularities in the procedure of the Selection Boards rather than a substitution of discretionary judgment in a promotion proceeding.

One year after its decision in *Weiss* the court delivered its opinion in *Clinton* v. *United States*, 191 Ct. Cl. 604, 423

F. 2d 1367 (1970), which, without citing *Weiss*, held at 606: "* * * that in awarding back pay we cannot postulate that a discretion [by a Selection Board] to promote would be exercised favorably." The conflict with *Weiss* is more apparent than real, and is attributable to the factual difference. Clinton's pass-overs by three successive Air Force Selection Boards for promotion to major were eventually changed by a Correction Board to expunge the first pass-over because the first Selection Board had wrongfully considered certain derogatory material which prejudiced his selection. This action made it possible for the third Selection Board to recommend his promotion rather than automatically pass him over as one who had been passed-over twice before. The net effect of the Correction Board's ruling was to backdate Clinton's promotion to a date consistent with his hypothetical selection by the 1968 Selection Board, and his claim on judicial review was for entitlement to being considered as approved by the 1967 Selection Board, which would have given him another 10 months' pay in the higher grade. The factual differences with *Weiss* and with the case under consideration are self-evident. Clinton was not separated from the service, whereas Weiss and Brenner were.

In summary, although Federal courts are neither permitted nor equipped to interfere with the discretion of military Selection Boards in their recommendations for or against the promotion of officers, in their promotion proceedings extreme care must be exercised to observe scrupulously applicable military conventions designed to shield from view by the Boards any material of a derogatory or prejudicial nature on the record of the individual candidate for promotion flowing from an investigation which is incomplete or procedurally defective. In these rare instances the courts may void the action of Selection Boards for critical procedural irregularity, for in competing with his peers for promotion in the service the individual officer is entitled to be judged on the basis of a record free from bias and distortion.

The plaintiff demands judgment for the pay of a lieutenant-commander up until the time of his normal retirement. Despite the fact that plaintiff's two pass-overs were procedurally defective, it cannot be assumed that if they were not

so defective the Selection Boards would have found that plaintiff merited promotion. Therefore, although plaintiff may recover pay at the grade at which he was discharged, he cannot recover it at any higher grade. The determination of the proper measure of damages should be remanded to the trial commissioner under Rule 131(c), including appropriate set-offs and credits, the duration of the award, and the question of eventual retirement pay.

## Findings of Fact

1. Plaintiff, born August 25, 1935, served in the United States Marine Corps Reserve from August 29, 1952, graduated from high school in 1954, and from active duty in the Marine Reserves won a competitive appointment to the United States Naval Academy, Annapolis, Maryland, standing within the top 160 authorized competitive appointments for enlisted members of the United States Navy and Marine Corps Reserves. He graduated from the Academy on June 4, 1958, with a Bachelor of Science degree, and was commissioned as an ensign. He was promoted to lieutenant (j.g.) on December 4, 1959, and to lieutenant on March 25, 1967 (effective retroactively to June 1, 1962). He was honorably discharged effective June 7, 1968.

2. During his naval career he was assigned sea duty on several destroyers and guided missile frigates, serving successively as antisubmarine warfare officer, gunnery officer, missile officer, assistant weapons officer, and weapons officer. He also had shore assignments as Training Program Manager for the Navy's Terrier Guided Missile Program, Dam Neck, Virginia, for 2 years, was stationed at the Bureau of Naval Personnel (BuPers) in Washington, D.C., on the Navy's Surface-to-Air Guided Missiles Systems, and in December 1966 he commenced what was expected and eventually proved to be a terminal assignment with the Navy Sub-Board of Inspection and Survey at Newport, Rhode Island. This assignment was not "career-enhancing" and was commonly regarded as a "twilight tour", to which line officers when assigned rightfully felt their naval careers were about to end.

3. During his naval service plaintiff received various commendations, honors, and praise:

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(a) On July 1, 1965, while serving on the *U.S.S. Luce* plaintiff was qualified as CIC watch officer and command duty officer by Comdr. Lademan, commanding officer of the *U.S.S. Luce*. In making these certifications to plaintiff, Comdr. Lademan recognized plaintiff's "demonstrated ability and sound judgment", stating as to the former that he had "complete confidence * * * in your ability to handle the ship under all conditions.", and as to the latter that "This watch qualification [actually referring to the qualification as command duty officer] is the highest attainable aboard *Luce* and represents the complete confidence of the commanding Officer in your ability to represent him as necessary in all matters administrative and operational * * *." This was the same Comdr. Lademan who, as plaintiff's rating officer, made out plaintiff's fitness report for the period from July 1, 1965 to February 19, 1966, and whose comments therein as to plaintiff's character were incompatible with his remarks of July 1, 1965, quoted above. (See finding 23(k), *infra*.)

(b) On December 2, 1966, Admiral Ruckner, the commanding officer of the Cruiser-Destroyer Force, U.S. Atlantic Fleet, commended the commanding officer of the *Luce* and his crew for the excellent rating given the ship during maneuvers on November 22 and 23, 1966, noting vast improvement in performance of its nuclear weapons mission. At that time the plaintiff was weapons officer of the *Luce* and his performance as such was largely responsible for the commendation. (Admiral Ruckner on May 11, 1966 had issued a letter of censure to plaintiff, and withdrew it on January 28, 1967 (finding 19(c), *infra*).

(c) On September 18, 1967, Comdr. J. C. Drake, then commanding officer of the *Luce*, issued plaintiff a Letter of Commendation which read in part as follows: "In Weapons Department evolutions, your demonstrated ability throughout the competitive year was noteworthy. * * * In your capacity as Weapons Officer, you made a personal and direct contribution toward the winning of this award [*i.e.*, Departmental 'E' for Excellence awarded by Admiral Ruckner to the *Luce*, the only missile type destroyer so honored]." On that occasion the plaintiff was commended for "outstanding performance of duty. * * * *Well done!* * * * A copy of

this letter will be made a permanent part of your service record." Another undated commendation by Comdr. Drake to plaintiff was for his "individual performance and achievements" as weapons officer during the period July 1, 1966 to November 28, 1966, on the *Luce* which "contributed measurably" during the fiscal year ending June 30, 1967, to the *Luce* winning several outstanding performance awards.

(d) On October 2, 1967, Admiral Eli T. Reich wrote to plaintiff's 1967 Selection Board recommending favorable consideration of plaintiff's promotion to lieutenant-commander referring to plaintiff as an "outstanding young officer whom I felt had great potential," and to his contribution as weapons officer to the winning by the *Luce* of a Weapons "E". This letter, which refers to a missile mishap during plaintiff's tenure as weapons officer of the *Luce*, which resulted in an investigation, was available for examination by plaintiff's 1967 Selection Board (see finding 31, *infra*).

(e) On April 12, 1962, Admiral Sends congratulated the commanding officer, officers and crew of the *U.S.S. Dewey* for their "splendid performance" in solving the problems plaguing the Terrier weapons system. "A sincere well done." Plaintiff at the time was missiles officer for the *Dewey* and an authority on the Terrier missiles, and therefore was instrumental in the earning of the commendation.

(f) On June 12, 1963, Office of the Chief of Naval Operations complimented plaintiff for his authorship of an article entitled "The Terrier BT–S" for publication in COMBAT READINESS.

(g) On July 27, 1960, the commanding officer of the *U.S.S. Blandy* (DD–943) on which the plaintiff was the antisubmarine warfare officer, issued a commendation to plaintiff for his "outstanding performance of duty" in that capacity from May 1959 until March 1960. The *Blandy* had won the Antisubmarine Warfare Departmental Excellence Award for fiscal year 1960 for demonstrating "that she was one of the most effective ships of her class [destroyer] in DESLANT in over-all ASW readiness."

(h) On August 16, 1960, the plaintiff was issued a commendation by the commanding officer of the *Blandy* for his "substantial contribution" to the award of a Battle Efficiency Plaque to the *Blandy* for fiscal year 1960.

(i) The commendations and complimentary references described in paragraphs (b), (c), (e), (f), (g) and (h) of this finding were permanently placed in plaintiff's file of fitness reports and were available to future Selection Boards.

4. Plaintiff was assigned as weapons officer to the *U.S.S. Luce*, a guided missile destroyer then under the command of Comdr. Lademan, reporting there May 23, 1965. On January 19, 1966, while the *Luce* was anchored at Mayport Naval Air Station, Florida, a nuclear-armed surface-to-air guided missile known as the Terrier was dropped on the deck of the *Luce* from a height of several feet while being routinely handled. The Terrier is 27 feet in length and 1½ tons in weight. The missile did not explode. Demolition crews removed it. There were no injuries. There was considerable publicity over the accident because of its potential consequences, although the Navy officially reported that because of the construction of the Terrier there was no risk of an explosion. As weapons officer the plaintiff had technical responsibility for the incident, whether or not he was negligent, according to the military rule of command responsibility.

5. Several official investigations were conducted of the missile accident circumstances referred to in finding 4, *supra*. One was by Comdr. Lademan, commanding officer of the *Luce*, assisted by Lt. Comdr. Kosmela, his executive officer. Another was by the Bureau of Weapons. Another by the Bureau of Ships. The principal investigation was by an Informal Board of Investigation.

6. At the instance of Admiral Ruckner (finding 3(b), *supra*), an Informal Board of Investigation convened January 22, 1966, and adjourned February 17, 1966. The Board consisted of three members (Capt. Schremp as senior member, assisted by Capt. Upshaw and a third member). The Board had subpoena power and authority to swear witnesses. A number of officers and enlisted personnel aboard the *Luce* testified *in camera*. The plaintiff was not present or represented at their testimony. Comdr. Lademan was present throughout the Board sessions. Plaintiff appeared voluntarily before the Board on Saturday, January 29, 1966, and testified at great length until fatigued when the Board recessed at 11 p.m.

7. On the next day, Sunday, January 30, 1966, without being fully cognizant of the nature and scope of the Board investigation, and without representation by counsel, plaintiff requested that he be made a Party to the investigation. No action could be taken on the request due to the absence of a third member of the Board. Plaintiff then conferred by telephone with his father, who was a lawyer and a retired (1958) Marine legal officer, who told him that he had perhaps been premature in requesting to be made a Party, and suggested that plaintiff merely continue to cooperate with the Board proceeding.

8. On Monday, January 31, 1966, plaintiff withdrew his request to be made a Party, and advised the Board that he wanted to continue to cooperate informally with the investigation without becoming a Party. Capt. Schremp advised him that he could not act on the withdrawal request in the absence of the third member of the Board. The next meeting of the Board was scheduled for February 7, 1966. Plaintiff left on January 31 for a 5-day cruise on the *Luce*. While at sea he was sent a dispatch advising him that he had been made a Party to the investigation "at his request." [1]

9. The principal rights of a Party in Interest to an investigation are:

(a) to be given due notice of designation as such.

(b) to be present during proceedings, except deliberations.

(c) to be represented by counsel.

(d) to cross-examine witnesses.

(e) to introduce evidence.

(f) to testify as a witness.

(g) to refuse to incriminate oneself.

(h) to make an argument at close of evidence.

10. Upon plaintiff's being made a Party to the investigation. Lt. Roy Olson was assigned as his military counsel.

[1] These two sentences are based on allegations in paragraphs 11 and 12 of the petition which defendant admitted in its answer. However, plaintiff's exhibit L, "Party's Written Acknowledgement of Advice on Rights and Waivers Thereof" dated February 4, 1966, bears the typed signature of plaintiff witnessed by the typed signature of Capt. Upshaw, a member of the Board. It appears to be a conformed copy of an original and, if so, represents that plaintiff accepted his designation as a Party at a time when the admission in the pleadings has him at sea. The conflict is curious but not important.

Plaintiff's father, Lt. Colonel Ernest Brenner, USMR, was permitted to act as plaintiff's individual counsel to assist Lt. Olson. Capt. Schremp advised plaintiff that the Board was investigating the incident simply to find facts, and that probably no more than a letter of censure would result.

**11.** At the resumption of the Board proceeding on February 9, 1966, the plaintiff was called as a witness. On advice of counsel plaintiff declined to testify. After a violent exchange between the Board and Lt. Olson, and the latter's request to refer the question to the convening authority, which Capt. Schremp refused to do, a Board member (Capt. Upshaw) is said to have told Lt. Olson, in effect: "Here's a nickel, where are your brains; here's a nickel, go call JAG." Outside the hearing room Capt. Schremp, senior member of the Board, handed a telephone to Lt. Olson with the reported direction: "Here, your boss wants to talk to you." Whereupon Olson talked on the telephone to his immediate superior. Schremp stayed a few minutes and was annoyed. The Board then reconvened. Plaintiff did not testify, but he and his counsel attended the remaining Board sessions until it adjourned February 17, 1966. On that date the plaintiff's security clearance was terminated.

**12.** Comdr. Lademan was also a Party to the investigation and attended all of the Board sessions represented by counsel. He was selected for a "due course" promotion to captain by the Selection Board that met in the late summer of 1966, having not been passed-over by any prior Selection Board. His executive officer, Lt. Comdr. Kosmela, was also promoted to commander in 1966.

**13.** The Board of Investigation record is classified as "Secret" and is not in evidence. It is not a verbatim transcript of the testimony, but paraphrases it. Plaintiff and some others in his behalf have seen the record, but present counsel requested its production informally and has not been given the opportunity to see it.

**14.** Some time prior to May 11, 1966, the Board recommended that plaintiff be issued a punitive letter of admonition relative to eight alleged specified derelictions in the performance of his duty.

**15.** On May 11, 1966, Admiral Ruckner, the convening authority for the Board of Investigation, sent plaintiff a let-

ter of censure in the degree of admonition. The letter referred to the missile mishap investigation and listed four personal derelictions on plaintiff's part as weapons officer (reduced from eight derelictions recommended by the Board),[2] none of which expressly referred to the missile accident which had precipitated the Board proceeding. The letter admonished plaintiff "For such negligence in the performance of your duties", advised him of his right to appeal the action within a reasonable time (set at 15 days after receipt of the letter in the absence of unusual circumstances), and advised that a copy of the letter would be placed in his official record in BuPers unless withdrawn or set aside by higher authority. Plaintiff was also advised of his right, within 15 days after final determination of any appeal, to submit for inclusion in his record at BuPers such statement concerning the letter of censure as he might desire. The letter concluded: "Your reporting senior is required to make notation of this letter in your fitness report submitted next after the issuance of this letter has become final, either by decision of higher authority upon appeal or by your decision not to appeal." The letter of censure was not in fact included in any of plaintiff's fitness reports since it was withdrawn. Nor was the letter of instruction which replaced it. See finding 23(1), *infra*.

**16.** Plaintiff received the letter of censure on May 28, 1966. On May 31, 1966, he wrote to Admiral Ruckner requesting a 4-month extension to prepare and file his appeal, citing the fact that on June 13, 1966, the *Luce* (with him as weapons officer aboard) would be deployed to the Mediterranean for 4 months. He also mentioned that advice of counsel would be necessary in preparing an appeal, and requested that he and his counsel have the Board record of proceedings made available to them for inspection in connection with preparing the appeal.

**17.** There followed a series of communications relative to plaintiff's effort to obtain a time extension to file his appeal, viz:

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[2] Ruckner found that four derelictions recommended by the Board were not supported by the record, and disapproved that portion of the Board recommendation.

(a) On June 8, 1966, Admiral Ruckner wrote to plaintiff giving him an extension to July 20, 1966 (letter not received by plaintiff aboard *Luce* until July 27, 1966), and giving limited permission to plaintiff's military counsel to inspect the Board record.

(b) On July 7, 1966, plaintiff's father, as counsel for plaintiff, wrote to Admiral Ruckner enclosing a tentative appeal from the letter of censure citing deficiencies in the Board proceeding, requesting an extension of time for preparing an adequate appeal to 30 days after plaintiff's return to the United States, and requesting that there be made available for examination the complete Board record necessary in the preparation of an appeal.

(c) Having had no reply to his letter of May 31, 1966, requesting a time extension (Admiral Ruckner's reply of June 8, 1966, was not received by plaintiff until July 27), and having learned by telephone on June 8, 1966, that Admiral Ruckner was considering an extension to July 20, 1966, for the plaintiff to file an appeal, the plaintiff on July 14, 1966, wrote to Admiral Ruckner advising him that the commander of the *Luce* had made available to him a copy of the Board record, and requested an extension to 30 days subsequent to the *Luce*'s return to the United States. Plaintiff advised Admiral Ruckner that preparation of his appeal was complicated by his extremely heavy operational commitments on the *Luce* during its cruise, by his inability to consult with counsel, and by his counsel's inability to obtain permission to examine the Board record.

(d) Plaintiff's letter of July 14, 1966, to Admiral Ruckner described in paragraph (c) of this finding was accompanied by a first endorsement dated July 20 by the commanding officer (Drake) of the *Luce* urging that plaintiff be given the time extension to appeal that he had requested, that plaintiff be relieved of his duties temporarily from the *Luce* and be transferred on temporary duty at Admiral Ruckner's headquarters so that he could devote requisite time to the preparation of his appeal, and stating as follows:

> This is a very critical matter to this young naval officer. In effect he feels, and perhaps with good reason, that his entire future hinges on his ability to appeal successfully from this letter. He will be in the promotion zone for

Lieutenant Commander this year. He cannot help but be affected in his daily activities by thoughts about the letter and fear of its consequences. His performance of duty in this ship is affected adversely therefore, and the effect of the letter is being compounded to the detriment of all.[3]

(e) Having received plaintiff's letters of May 31 and July 14, 1966, and the letter of July 8, 1966, from plaintiff's father, all of them relative to plaintiff's request for a time extension to appeal the letter of censure, on July 27, 1966, Admiral Ruckner advised the commander of the *Luce* by teletype that "no new basis for 4 months time extension exists", and that plaintiff could not be temporarily detached from the *Luce* to give him time to prepare his appeal (as the commander of the *Luce* had suggested), but that the request and Admiral Ruckner's ruling thereon would be forwarded to the C-in-C, U.S. Atlantic Fleet for "resolution and disposition." Thus as of July 27, 1966, with all the facts known as to plaintiff's absence on an extended cruise and his inability to prepare an adequate appeal to the letter of censure, Admiral Ruckner was not disposed to give him an extension.

(f) By first endorsement of August 5, 1966, Admiral Ruckner forwarded to the C-in-C, U.S. Atlantic Fleet, all of the papers relevant to the letter of censure and plaintiff's efforts to secure an extension of time to file an appeal (except the Board record which had previously been sent on May 14, 1966, to JAG via the C-in-C), and recommended to the C-in-C "that no further extension of appeal be granted, *and that the appeal be denied.*" (Emphasis supplied.) A copy of this endorsement was sent to plaintiff, and another copy was sent to plaintiff's father on August 16, 1966, which was the first response the latter had received to his letter of July 7, 1966, as stated in paragraph (b) of this finding. Apparently Admiral Ruckner felt either that the correspondence he had received

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[3] Despite his predicament, note in finding 3(b), *supra*, plaintiff was apparently performing well enough as weapons officer on the *Luce* to merit an indirect commendation by Admiral Ruckner for obtaining an Excellent rating for the *Luce* during its maneuvers on that cruise. Note also plaintiff's fitness report for the period July 1 to November 28, 1966, which, along with pluses and minuses in plaintiff's performance, quotes a chief inspector's comment after the *Luce* had received an Excellent grade, that "The performance and positive attitude of the Weapons Officer [the plaintiff] is especially noteworthy and a prime factor in the ship's high state of readiness."

to date from plaintiff or in his behalf constituted a sufficient appeal, or that plaintiff's appeal time had lapsed and the right had been forfeited. (This is merely an interpretation of the Admiral's first endorsement of August 5, 1966, referred to above.)

(g) On September 30, 1966, the Deputy Chief of Staff, U.S. Atlantic Fleet, wrote plaintiff's father advising him that plaintiff was granted an extension of time to November 25, 1966, to submit his appeal from the letter of censure. The plaintiff received formal notification of the extension on November 22, 1966, abroad the *Luce* at sea [4] when he received a letter dated November 9, 1966, to that effect from the Assistant Chief of Staff of the U.S. Atlantic Fleet based in Norfolk, Virginia. Why formal notification to plaintiff was delayed until November 9, 1966, when plaintiff's father was given formal notification by the U.S. Atlantic Fleet on September 30, 1966, is not apparent. Nor does the record reveal whether plaintiff's father was able to communicate the news of the time extension to plaintiff within a reasonable time after September 30, 1966.

(h) On November 24, 1966, plaintiff submitted his appeal, one day prior to the November 25, 1966, deadline. In his appeal plaintiff set out ten assignments of error, viz:

(1) Failure to designate plaintiff as a Party at the initiation of proceedings.

(2) Failure to afford him the rights of a Party.

(3) Refusal to permit him to withdraw his request to be made a Party.

(4) Failing to inform him of the reasons for concluding that he should be designated a Party.

(5) Making findings adverse to him.

(6) Failing to afford him a fair and impartial hearing.

(7) Subjecting his appointed counsel to improper influence.

(8) Adversely commenting upon his exercise of his right not to testify.

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[4] As observed in finding 3(b), *supra*, plaintiff was preoccupied on November 22 and 23, 1966, in maneuvers on the *Luce* which won the ship an "E" rating from Admiral Ruckner, an accomplishment largely attributable to plaintiff's functioning as weapons officer.

(9) Conducting proceedings at such time that he was unable to protect his interest.

(10) Unduly and improperly harassing the efforts of his individual counsel.

(i) Routine mail delivery from the United States to personnel on the *Luce* while it was on extended maneuvers in the Mediterranean took from 3 to 5 days.

**18.** On January 28, 1967, Admiral Ruckner wrote to the C-in-C, U.S. Atlantic Fleet that, based on plaintiff's appeal, he had set aside the punitive letter of censure, and requested that the copy of the letter of censure forwarded to the C-in-C previously "be destroyed or returned to the originator.", namely, himself. On February 9, 1967, the C-in-C, U.S. Atlantic Fleet, advised Admiral Ruckner by letter that the letter of censure had been destroyed as requested.

**19.** (a) Also on January 28, 1967, Admiral Ruckner wrote to the JAG, with copy to plaintiff, advising that plaintiff's appeal "presents substantial new evidentiary matters that are in conflict with the evidence before the board" and which, had they been available earlier, " the punitive letter may not have been issued." The new matters, said Admiral Ruckner, "do mitigate the derelictions alleged", and therefore he "has set aside the letter of admonition and issued a letter of instruction to Lt. Brenner." Finally: "Additionally, [I] consider that the investigation, as in the case of Commander Dixon M. Lademan * * * should be made a matter of interest in the official record of Lt. George H. Brenner." [5] No copy of this letter to JAG was sent to C-in-C, U.S. Atlantic Fleet.

(b) The Board record is classified as "Secret" and a copy is in the custody of JAG along with all sequential endorsements, including references to Admiral Ruckner's letter of

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[5] Commander Lademan, whose promotion to captain had been approved by the Selection Board in the summer of 1966 (see finding 12, *supra*), would not be affected to the same extent as plaintiff by the deposit of the Board record in his record as a matter of interest. Plaintiff was passed-over by the Selection Boards which convened in 1966 and 1967 (see findings 25 and 26, *infra*). By "official record" it is assumed that Admiral Ruckner's reference to instruction to JAG meant that the Board record, including the letter of instruction to plaintiff, would be filed in plaintiff's record in BuPers. There is no indication that a letter of instruction was issued to Lademan, or that the Board recommendation found him at fault re the missile accident, although he was a Party to the investigation and attended all sessions of the Board accompanied by counsel. The Board record is not in evidence.

censure to plaintiff, his withdrawal thereof and substitution of a letter of instruction, and his request to JAG to deposit the entire package in plaintiff's official record as a "matter of interest." It is not disclosed when the records were transmitted by JAG to BuPers, but it is concluded that they were so transferred sometime after January 28, 1967, because on January 31, 1968, one year later, the Chief of Naval Personnel caused an endorsement to be attached thereto, which recited the instructions of January 28, 1967, received by JAG from Admiral Ruckner and stated as follows:

> * * * However, lacking a supplementary investigation to reconcile the evidentiary matters in conflict, it is not considered appropriate to hold this investigation as a matter of interest in the official records of either CDR LADEMAN, the CO of LUCE, or LT. BRENNER. * * *

(c) Also on January 28, 1967, Admiral Ruckner wrote to plaintiff stating that the proceedings of the Board were in substantial compliance with the JAG Manual requirements for an informal investigation, but that the substantial new evidentiary matters presented in plaintiff's appeal mitigated the dereliction alleged and would have possibly averted action of a punitive nature if such matters had been available to the Board. Therefore Admiral Ruckner advised plaintiff that he had set aside the letter of censure previously issued plaintiff, and stated as follows:

> Nevertheless, it is apparent that there were deficiencies in the Weapons Department on board USS LUCE (DLG7) and that as Weapons Officer you were responsible for the proper administration of this department. Although the circumstances as now presented do not warrant punitive action, it is considered that your performance prior to the incident involved was deficient. You are, therefore, to take the contents of reference (b) [the letter of censure] as a caution, not in the sense of Article 15, UCMJ, but merely instructional in nature. Reference (b) [the letter of censure] will not be made a part of your official record and will not be forwarded to higher authority.[6] Its sole purpose is the improvement of your performance of duty.

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[6] Note that on the same day, January 28, 1967, Admiral Ruckner had ordered JAG to deposit the Board record in plaintiff's official record as "a matter of interest." Ruckner also requested that JAG make Ruckner's letter to JAG a part of the Board of Investigation record.

At this time the plaintiff was no longer under Admiral Ruckner's command. Note in finding 3(b), *supra*, that on December 2, 1966, Admiral Ruckner had indirectly commended plaintiff.

(d) While stationed with the Navy Sub-Board of Inspection and Survey at Newport, Rhode Island on his final tour of duty before discharge (commencing December 1966 as stated in finding 2, *supra*), the plaintiff was told by Admiral Ruckner's senior legal officer (whose name plaintiff could not recall) that Admiral Ruckner was told by his higher command to "squash" the letter of censure issued to plaintiff because of evidence that had been allowed in the Board investigation. He is said to have apologized to plaintiff and to have said in effect, "it is just unfortunate that you were at the wrong place at the wrong time."

(e) An official communication from Navy JAG dated August 11, 1971, and placed in evidence as a defendant's exhibit states as follows:

> The letter of admonition [*i.e.*, letter of censure in the degree of admonition] which would have been awarded as non-judicial punishment (10 U.S.C. 815) was, as Commander Cruiser-Destroyer Force U.S. Atlantic Fleet stated in his endorsement, withdrawn by him and no record that it had ever been awarded remains in any record. The letter of instruction issued in its place would of necessity be non-nonpunitive [sic] and therefore would not appear as such in Lieutenant Brenner's record. The original was undoubtedly delivered to Lieutenant Brenner with no other distribution of copies.

This statement by JAG is obviously ambiguous and not reliable. Its concluding sentence is contradicted by the letter of instruction issued to plaintiff on January 28, 1967, which reflects distribution of a copy to the C-in-C U.S. Atlantic Fleet, despite JAG's representation that no one but plaintiff received the letter of instruction. Note also that the JAG statement merely says in effect that the letter of instruction of necessity would not appear in plaintiff's record because it was nonpunitive in nature and JAG procedure was not to keep such documents, but the statement does not say that a search was made for it. As a matter of fact, joint exhibit No. 2, an affidavit of January 6, 1971, by the custodian of

JAG's records, makes it clear that all of the Board of Investigation record and its sequential endorsements were at all times on file with JAG.

**20.** On February 20, 1967, plaintiff's individual counsel (his father) wrote to the JAG complaining that Admiral Ruckner had, in violation of JAG Manual provisions, directed JAG to include the Board record in plaintiff's official record as a matter of interest, after having asked the C-in-C U.S. Atlantic Fleet to destroy the letter of censure (which was done). The letter requested that the Board record reflect that the letter of censure was set aside, that the Board record not refer to the issuance of a nonpunitive "letter of instruction", and that the Board record not be made a matter of interest in plaintiff's official record as Admiral Ruckner had ordered. There is no indication as to whether this letter was ever answered or complied with, except to the extent reflected in finding 19(e), *supra*.

**21.** In May 1966 complete copies of the Board of Investigation record (including first endorsement) were sent by Admiral Ruckner to JAG, BuWeapons, Ship Missile Systems Engineering Station, Naval Weapons Evaluation Facility, and the commanding officer of the *Luce*. Also in May 1966 Admiral Ruckner sent a copy of the first endorsement to the Board of Investigation record, only, to the Commander of Cruiser-Destroyer Flotilla SIX, Commander Destroyer Squadron EIGHT; and to the senior member of the Board of Investigation (Capt. Schremp). The first endorsement indicated that a letter of censure had been issued to plaintiff. As stated in finding 19(b), *supra*, the Board of Investigation record, etc., were lodged with BuPers from sometime after January 28, 1967, until at least January 31, 1968.

**22.** (a) Throughout the 10 years of his active duty in the Navy the plaintiff received 22 periodic fitness reports. Four important sections of each fitness report are:

14. Performance of duties
15. Overall evaluation
16. Desirability
20. Leadership

Each of these listed categories on the fitness reports (except No. 15) is subclassified into either duty assignments or per-

sonal characteristics. Each of the subcategories is columnized for the officer to be rated from "Outstanding" or its equivalent (at the top of the range) down to "adverse" (at the bottom of the range). The officer is rated by his superior officer during the particular rating period. In rating the officer, the superior will indicate by inserting X-marks in the appropriate boxes as to those subcategories for which no rating is given because the officer being rated has not been observed with respect to those subcategories. As to all other subcategories where the officer being rated was observed, the rating officer inserts an X-mark in the appropriate box to indicate as objectively as possible his judgment of the subject officer's earned rating for the period covered by the report.

23. In order to determine statistically from plaintiff's 22 fitness reports how he averaged out in comparison to a median, your trial commissioner devised a system of giving weighted points to each box, from 5 at the top end (outstanding) to 1 at the bottom end (adverse), and comparing the plaintiff's points to the artificial median. The following results were obtained from this analysis:[7]

(a) # 14—*Performance of duties*—Out of 22 reports the plaintiff equalled the median in 3 reports and exceeded the median in 19 reports.

(b) # 15—*Overall*—Out of 22 reports the plaintiff equalled the median in 8 reports and exceeded the median in 14 reports. Defendant's requested finding 12(d) analyzes plaintiff's scores in this category to reflect that in several fitness reports the plaintiff was placed at the bottom of the rating officer's list of preferences where the latter was simultaneously rating several officers. (See paragraph (g) of this finding, *infra.*)

(c) # 16—*Desirability*—Out of 22 reports the plaintiff equalled the median in 5 reports, was less than the median in 3 reports, and exceeded the median in 14 reports.

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[7] It is not known what system the Selection Board uses to analyze a promotion candidate's fitness report. This analysis does not purport to reflect the individual's standing vis-a-vis other candidates whose respective fitness reports are not before us. It merely compares the individual's point standing vis-a-vis a hypothetical median, which median is not intended to reflect the average fitness report standing of the roster of officers before any Selection Board. It is a theoretical exercise. *Cf.* a comparable effort using numerical equivalents in analysing fitness reports appearing in finding 13 of *Norman* v. *United States*, 183 Ct. Cl. 41, 392 F. 2d 255 (1968), *cert. denied* 393 U.S. 1018 (1969).

(d) # 20—*Leadership*—in 22 reports the plaintiff equalled the median in 3 reports and exceeded the median in 19 reports.

(e) In 13 out of 22 fitness reports the plaintiff exceeded the collective median covering all 4 categories selected for analysis.

(f) In 19 out of 22 fitness reports the plaintiff equalled or exceeded the collective median covering all 4 categories selected for analysis.

(g) Plaintiff's ratings throughout the 22 reports were generally better in categories 14 and 20 (Performance of Duties, and Leadership, respectively), than in 15 and 16 (Overall, and Desirability, respectively). The categories of "Overall" and "Desirability" necessarily represent an entirely subjective and inherently imprecise value judgment by the rating officer, at least in comparison to the more objective type of grading criteria present in the "Performance of Duties" and "Leadership" categories. Thus a prickly personality could make an officer an undesirable shipmate, even though he might excel in many nautical proficiencies highly relevant to his ultimate military role.

(h) The plaintiff's most consistently successful years of achievement as reflected in the four selected categories of his fitness reports were from June 1, 1959 to June 30, 1965. In his last 3 reports covering the period from November 29, 1966, to his discharge in June 1968, he was embittered and not highly motivated as a result of being passed-over by the Selection Boards and the prospective end of his naval career through what he considered unfair circumstances.

(i) The plaintiff seemed capable of high achievement on many occasions, as witnessed in the honors and commendations which he won directly or indirectly (see finding 3, *supra*). While the plaintiff's ratings for the various categories would vary from period to period, or from rating officer to rating officer, the impression is gained from a close study of all of his fitness reports that the plaintiff excelled in such matters as ship handling, seamanship, gunnery, military bearing, loyalty, and self-expression, while he was sometimes average or less in matters of judgment, reliability, cooperation, and compassion with subordinates.

(j) Each fitness report contained a "Comments" section in which the rating officer discussed strengths, special accom-

plishments, contributions to the service, and minor weaknesses. The person that collectively emerges from these comments (with sometimes contradictory and fluctuating characteristics depending on the reaction of the individual rating officer to the individual being rated, as well as the fluctuating caliber of plaintiff's performance and motivation from one reporting period to another) is that on the plus side the plaintiff impressed many of his rating officers as energetic, highly motivated, ambitious, dedicated, alert, intelligent, enthusiastic, resourceful, and highly qualified in ship handling, seamanship, and gunnery. On the minus side the plaintiff impressed some of his rating officers as being undiplomatic, dictatorial to subordinates, bored with routine duties, lacking judgment, impulsive rather than thoughtful. Generally speaking the adverse comments respecting the plaintiff were as to facets of his character which should improve with time and maturity, and the favorable comments revealed an officer with considerable potential for achievement.

(k) Of all the comments contained in plaintiff's fitness reports, the least flattering were those on plaintiff's fitness report for the period July 1, 1965–February 19, 1966, by Comdr. Lademan. This is the period during which the missile incident of January 19, 1966, and the Board inquiry of January 22–February 17, 1966, occurred, in which both plaintiff and Comdr. Lademan were named as Parties.[8] This particular fitness report was furnished plaintiff on May 19, 1966, by BuPers, and his comments were invited. Plaintiff, who was then at sea on a protracted cruise aboard the *Luce*, responded on September 11, 1966, with a lengthy rebuttal of Comdr. Lademan's derogatory comments. The plaintiff was then aware that he was scheduled for promotion by the Selection Board and he was discouraged over the potential effect of the fitness report in question on his naval career. A response by

[8] Comdr. Lademan gave plaintiff a "Satisfied to have" rating under "Desirability", which is next to the lowest rating available ("Prefer not to have"), although in the immediately preceding period Comdr. Lademan had rated plaintiff as "A very fine officer of great value to the service", which is next to the highest rating available under the Desirability category. Since the lower rating of February 19, 1966, was made 2 days after the adjournment of the Board proceeding, it is concluded that it influenced the low rating. Up until then this was the lowest rating the plaintiff had ever received.

Comdr. Lademan on October 6, 1966, defending his fitness report evaluation of plaintiff, commends the plaintiff's industry, and criticizes his proneness to antagonize others, a weakness in which Comdr. Lademan had observed an improvement. [Note that the plaintiff's Selection Board met September 27 to November 10, 1966, and plaintiff's explanation of September 11 and Lademan's response of October 6 were not received by BuPers until October 11, so there is some question as to what opportunity the Selection Board had to see these communications before passing-over plaintiff. See finding 25, *infra.*]

(l) The only reference in plaintiff's file of *fitness* reports to the subject of the Board proceeding was in the fitness report by Comdr. Drake for the period February 20, 1966–June 30, 1966, in which the rating officer observed that "During a major part of this period Lt. Brenner has been affected by his prior participation in an investigation to which he was a party, and in which he feels apparently that he was done a grave injustice."

**24.** Plaintiff was considered but not recommended for promotion to lieutenant-commander by a Selection Board which met from September 21 to October 22, 1965. This was not considered a "pass-over" on plaintiff's record, since he was below-the-promotion-zone on that occasion.

**25.** A Selection Board for the recommendation of line officers of the Navy for temporary promotion to lieutenant-commander met from September 27 to November 10, 1966. The Board consisted of eight members and 14 alternate members, all of them captains. Junior officers were appointed as recorder and assistant recorders. The "precept" convening the Board gave a quota of 324 promotions to lieutenant-commander, with limits as to certain categories, and stated that "The fact that an eligible officer is above, within, or, below the promotion zone is immaterial to the determination of whether that officer meets the criteria established by law for his category." However, a limit of 5 percent was imposed for promotion of officers below the promotion zone. (Whether this limit applied to the preceding Selection Board in 1965 in which plaintiff was below-the-zone as referred to in finding 24, is not disclosed by the record.) Eighty to 90 percent of the

candidates before the 1966 Selection Board were recommended for promotion. Plaintiff was passed-over. A graduate of the Naval Academy would normally be given preference by the Selection Board for promotion, all other things being equal, although this factor was not as influential as in prior years.

**26.** The next Selection Board for the lieutenant-commander promotion list met from October 3 to November 21, 1967. It was composed of eight members and 14 alternate members, all captains. Its quota of promotions was 943. As in the case of the 1966 Board, a limit of 5 percent was imposed on the number of officers recommended for promotion who had been passed-over once before. The 1967 Board recommended 80 to 90 percent of the candidates for promotion. Plaintiff was again passed-over. Under 10 U.S.C. § 6382 a second pass-over for lieutenant-commander selection automatically results in separation the next succeeding June 30.

**27.** A Captain Meyer was an alternate member of plaintiff's 1967 Selection Board. Meyer was known to plaintiff by reputation as an officer considered to be an authority in naval missiles and one who was familiar with the missile accident on the *Luce* because he had been involved in the investigation of the accident for BuWeapons. Plaintiff testified to his belief that Meyer either passed on his promotion candidacy at the 1967 Selection Board proceeding, or had been consulted by the members of that Board who did. By affidavit in the record Meyer conceded that he had participated in the investigation of the *Luce* accident, but denied having seen a copy of the report of the Board of Investigation concerning it, or having known of any consequences therefrom to plaintiff. While the accident was well known in the "missile Navy" circles, as an alternate member of the 1967 Selection Board, he denied having discussed the accident with the 1967 Selection Board members or the plaintiff's connection with it, nor did he hear any mention of the accident in the course of the Selection Board proceedings. There is no evidence to the contrary. Moreover, Meyer was not a member of the 1966 Selection Board where the plaintiff alleges he was first passed-over due to the Selection Board's knowledge of the missile accident, so Meyer as a source of such information would seem remote.

28. (a) Lt. Comdr. Saunders was a witness called by plaintiff. For the last 9 years of his naval service (until 1968) he was head of the Fitness Report Branch, BuPers. He was in charge of 45 civilians who administered the Navy's program of Officer Performance Evaluations. During that period he briefed every Navy Selection Board that met, that is, he explained the documents furnished them concerning the candidates for promotion on each list, primarily the fitness report file jacket and brief sheet which was a worksheet condensed from the fitness report file jacket, and instructed the Board how to use this material in their evaluation process. The file of each candidate for promotion was screened by Comdr. Saunders' staff to insure that the record of fitness reports was complete. Each jacket would contain, in addition to the individual's fitness reports, all letters of commendation, censure, disciplinary action, and "anything coming out of an investigation, any action, derogatory action, that resulted in an investigation would logically be reflected in the Selection Board jacket." Fitness reports are of prime importance to the Selection Board to passing on promotions; the other contents of the file jacket are of secondary importance since the fitness reports should reflect anything of a derogatory nature, the specifics of which should be found elsewhere in the file jacket.

(b) Plaintiff's second Selection Board (1967) would know that plaintiff had been passed-over by the first Board because of his "lineal position" on the roster of candidates, arranged according to dates of rank. Although the fact of having been passed-over by one Board should not influence the individual's selection on his next Board, as a practical matter he is more likely than not to be passed-over by the second Board because the derogatory information in his file which caused the first pass-over is still in his file. Only a small percentage of officers with one pass-over succeed the second time.

(c) Plaintiff's pass-over problem is somewhat unusual because there are not many officers on a promotion list who are subjects of an investigation in process but not completed at the time of Board action. The investigation of the missile mishap on the *Luce* was technically completed February 23, 1968, so it was pending during both the 1966 and the 1967 Selection Board meetings.

29. (a) Comdr. Saunders has no recollection that either the 1966 or 1967 Selection Board asked him for a record of the Board of Investigation proceeding in January 1966 to which plaintiff had been made a Party. The only reference in plaintiff's *fitness* reports to his involvement in an investigation was the fitness report for the period February 20, 1966–June 30, 1966, which comments on plaintiff's participation in an investigation (see finding 23(l), *supra*). Other references to plaintiff's involvement in that proceeding which were in the documents before the Selection Boards were (1) the letter of October 2, 1967, by Admiral Reich in plaintiff's behalf to the 1967 Selection Board (see finding 3(d), *supra*), and (2) the Security Termination Statement of February 17, 1966, which was in plaintiff's personnel file before both Selection Boards (see finding 30, *infra*). Comdr. Saunders said that if a Selection Board member had noticed these references concerning plaintiff, he could have asked him (Comdr. Saunders) to produce the Board of Investigation record for the Board to examine in evaluating plaintiff's candidacy for promotion. Since the plaintiff was issued a letter of censure in May 1966 and his first Selection Board convened in September 1966, Comdr. Saunders said "I would think that it was likely" that the Board had before it the letter of censure, since the investigation report is considered complete at the time the letter of censure is issued. Comdr. Saunders believed that a letter of instruction is normally made a matter of record for inclusion in the promotion candidate's file jacket before the Selection Board, but he was not certain of that. If a letter of censure were in a candidate's record before a Selection Board "Of course, it would have a derogatory inference as any critical or derogatory or low mark would have." He stated further: "* * * There's some question as to whether or not the [Selection] Board might have had knowledge about it [the Board of Investigation proceeding to which plaintiff was a Party] and you can't pin this down. * * *"

(b) Comdr. Saunders had no recollection of being asked by the 1966 Selection Board for the Board of Investigation record concerning plaintiff. He recalls that in late 1966 or early 1967, after the 1966 Selection Board had passed-over

plaintiff the first time, the plaintiff asked him if the Board had requested the production of the Board of Investigation record concerning plaintiff, but he recalls no specifics. (Plaintiff testified that Comdr. Saunders had told him that the 1966 Selection Board had asked him (Comdr. Saunders) for the Board of Investigation record, but he had refused to provide it because the investigation was not at that time complete). Note that Comdr. Saunders considers such an investigation complete when a letter of censure is issued, apparently even when an appeal is pending, although his testimony was contradictory on this point. The fact that such a record was classified Secret would make no difference.

(c) According to Comdr. Saunders, Board of Investigation reports as to completed investigations involving a promotion candidate, deposited with JAG as a "matter of interest", were routinely made available to Selection Boards. It is clear that JAG had on file at all times a complete copy of the Board of Investigation record, and also a letter of January 28, 1967, from Admiral Ruckner referring to the fact that a letter of instruction had been issued to plaintiff.

**30.** A "Security Termination Statement" dated February 17, 1966 (at the conclusion of the Board of Investigation proceeding) was issued to plaintiff. It refers specifically to the Informal Board of Investigation to which plaintiff was a Party. This statement was available to plaintiff's Selection Boards.

**31.** Although the correspondence record is incomplete, on the basis of the clues provided in the correspondence that is in the record, coupled with the testimony of Comdr. Saunders, it is reasonable to conclude that the 1966 Selection Board knew from references in the records known to be before it, that plaintiff had been a Party to an investigation, which references would have in normal course prompted the Board's demand for the record of the proceeding, and that whatever inclinations the Board may have had to approve plaintiff for promotion on the basis of his fitness reports would have been prejudiced by the Board's incomplete knowledge that the plaintiff had been in trouble. The 1967 Selection Board would have had more certain reason to demand the complete record of the Board of Investigation proceeding and its

sequelae because Admiral Reich's letter to the 1967 Selection Board on plaintiff's behalf (finding 3(d), *supra*), made specific reference to the fact, These conclusions are necessarily circumstantial because proceedings of Selection Boards are secret and not recorded. While it is known that fitness reports are the prime basis of the Selection Board's recommendation, the description of other data of a prejudicial nature which the Board may have considered or known about is not normally ascertainable, or at least it was not in this case. Additionally, broadcast of copies of the Board of Investigation record throughout the "missile Navy" by Admiral Ruckner in May 1966 (finding 21, *supra*), reinforces the reasonable inference that plaintiff's involvement therein had come to the attention of his Selection Boards, to his detriment. Finally, of subtle effect on the 1967 Selection Board would be its knowledge that in December 1966, plaintiff had been assigned to a "twilight tour" at Newport, Rhode Island, which is not considered a "career-enhancing" assignment for a line officer and would be recognizable as such by the experienced naval captains who composed the Selection Board. It would serve as a tell-tale clue to the Board that plaintiff's superiors were grooming him for separation, even before his consideration by the second Selection Board.

**32.** On December 6, 1967, after having been passed-over by the second Selection Board, and having been transferred to a Navy Sub-Board of Inspection and Survey at Newport Naval Base, plaintiff requested an early discharge and a commission in the naval Reserve. Plaintiff knew that the other officers assigned to that inspection duty had been passed-over once or more for promotion, and that such assignments were deliberately given to officers whose naval careers were coming to an end due to lack of promotion prospects. Comdr. Saunders verified that the assignment of an unrestricted line officer (such as plaintiff) to an inspection service would not enhance his career prospects. Plaintiff was honorably discharged June 7, 1968.

**33.** In response to a question by the trial commissioner in the course of trial, the plaintiff testified that if he were offered reinstatement in the Navy he would decline. His age,

lengthy interruption of active duty, and the ineradicable blotting of his copy book would make his advancement too unlikely as a retread. He is now selling real estate.

34. From a complete absence of evidence to that effect, it is concluded that plaintiff never applied for relief to a Board for Correction of Naval Records.

## Recommended Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to a judgment on liability, with the amount of recovery to be determined pursuant to Rule 131(c).

U.S. GOVERNMENT PRINTING OFFICE: 1972

# In the United States Court of Claims

No. 296–68

(Decided October 17, 1973)

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GEORGE H. BRENNER v. THE UNITED STATES

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*Arnold D. Levine*, attorney of record, for plaintiff. *Levine & Freedman, P.A.*, of counsel.

*LeRoy Southmayd, Jr.*, with whom was *Assistant Attorney General Harlington Wood, Jr.*

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Before DAVIS, *Acting Chief Judge*, LARAMORE, *Senior Judge*, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

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OPINION

SKELTON, *Judge*, delivered the opinion of the court: *

Plaintiff, a lieutenant in the United States Navy with over ten and one-half years of active duty service, who was honorably discharged effective June 7, 1968, after having been passed over for promotion to lieutenant commander by two successive selection boards, seeks recovery of both the active duty and retirement pay of a lieutenant commander.

The plaintiff's suit is not based on an illegal discharge. Instead, he claims that the actions of the selection boards in twice passing over him for promotion and failing to select him for promotion to lieutenant commander, as shown below, were arbitrary, capricious, and contrary to law. The case was heard by our Trial Judge C. Murray Bernhardt.

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*We are indebted to Trial Judge Bernhardt for his opinion and findings of fact, much of which we have adopted. However, we reach a different result.

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We have carefully considered the pleadings, briefs, and oral arguments of the parties and have concluded that the plaintiff is not entitled to recover. The basic facts in the case are as follows:

Plaintiff enlisted in the United States Marine Corps Reserve in 1952 and was appointed to the United States Naval Academy where he graduated as an ensign in June 1958. He was promoted to lieutenant (jg) in 1959, and to lieutenant in 1967 (effective retroactively to June 1, 1962). He was honorably discharged effective June 7, 1968, having been passed over for promotion to lieutenant commander by two successive selection boards.

While plaintiff was serving as weapons officer on the *U.S.S. Luce* on January 19, 1966, under the command of Commander Lademan, a 1½ ton nuclear missile was dropped on the deck of the *Luce* while the *Luce* was anchored at Mayport Naval Air Station, Florida. The missile did not explode, there were no injuries, but there was considerable publicity over the accident because of its potential consequences. As weapons officer, the plaintiff had technical responsibility for the incident, whether or not he was negligent.

On January 22, 1966, an informal board of investigation was convened to inquire into the circumstances of the missile accident. Plaintiff appeared voluntarily before the board and testified on January 29, 1966. On the next day, plaintiff requested that he be made a party to the investigation, but after consulting on January 31, 1966, with his father, a lawyer, plaintiff withdrew his request to be made a party. However, the board advised the plaintiff that he had been made a party to the investigation. Plaintiff was assigned military counsel, and plaintiff's father, a retired Marine legal officer, was permitted to act as plaintiff's individual counsel to assist Lt. Olson, the assigned military counsel.

At the resumption of the board proceeding on February 9, 1966, plaintiff was called as a witness but declined on advice of counsel to testify. Plaintiff and his counsel did though attend the board sessions until it adjourned on February 17, 1966. On that date, plaintiff's security clearance was terminated. The board of investigation record is classified as "Secret" and is not in evidence, and was not furnished to the

selection boards nor condsidered by them, but plaintiff and some others in his behalf have seen the record.

The board of investigation recommended that plaintiff be issued a punitive letter of admonition relative to a total of eight alleged specified derelictions in the performance of his duty. Following receipt of the board proceedings, Admiral Ruckner, the convening authority for the board, issued on May 11, 1966, a letter of censure in the degree of admonition which was received by plaintiff on May 28, 1966. The letter referred to the missile mishap investigation and listed the following four personal derelictions on plaintiff's part as weapons officer:

> 1. Deletion of several discrepancies relating to Weapons System check sheets which resulted in confusion and did not properly alert the Commanding Officer.
> 2. Knowingly permitted Commanding Officer to report corrections of discrepancies where such had not been corrected.
> 3. Failure to complete or insure completion of the assembly of weapons publications as required.
> 4. Failure to implement Weapons Department Organization as directed.

Following a series of communications relative to plaintiff's efforts to obtain time extensions to file an appeal, plaintiff, on November 24, 1966, submitted his appeal wherein was set out ten assignments of error, *i.e.:*

> 1. Failure to designate plaintiff as a party at the initiation of proceedings.
> 2. Failure to afford him the rights of a party.
> 3. Refusal to permit him to withdraw his request to be made a party.
> 4. Failing to inform him of the reasons for concluding that he should be designated a party.
> 5. Making findings adverse to him.
> 6. Failing to afford him a fair and impartial hearing.
> 7. Subjecting his appointed counsel to improper influence.
> 8. Adversely commenting upon his exercise of his right not to testify.
> 9. Conducting proceedings at such time that he was unable to protect his interests.
> 10. Unduly and improperly harassing the efforts of his individual counsel.

On January 28, 1967, Admiral Ruckner, in a letter to the Commander-in-Chief, Atlantic Fleet, advised that he had set aside the punitive letter of censure, and requested that the copy of the letter of censure previously forwarded to the commander-in-chief "be destroyed or returned to the originator," namely himself. On February 9, 1967, the Commander-in-Chief, Atlantic Fleet, advised Admiral Ruckner by letter that the letter of censure had been destroyed. The plaintiff was advised on January 28, 1967, by letter from Admiral Ruckner, that he had set aside the letter of censure previously issued plaintiff, and, in conclusion, stated as follows:

> Nevertheless, it is apparent that there were deficiencies in the Weapons Department on board *USS LUCE* (DLG7) and that as Weapons Officer you were responsible for the proper administration of this department. Although the circumstances as now presented do not warrant punitive action, it is considered that your performance prior to the incident involved was deficient. You are, therefore, to take the contents of reference (b) [the letter of censure] as a caution, not in the sense of Article 15, UCMJ, but merely instructional in nature. Reference (b) [the letter of censure] will not be made a part of your official record and will not be forwarded to higher authority. Its sole purpose is the improvement of your performance of duty.

Also on January 28, 1967, Admiral Ruckner wrote to the Judge Advocate General, with copy to plaintiff, advising that he had set aside the letter of admonition and had issued a letter of instruction to plaintiff. Further, he requested that the investigation, as in the case of Commander Lademan, should be made a matter of interest in the official record of plaintiff. On January 31, 1968, the Chief of Naval Personnel caused an endorsement to be attached to the records of the board of investigation which recited the instructions of January 28, 1967, received from Admiral Ruckner and further stated as follows:

> * * * However, lacking a supplementary investigation to reconcile the evidentiary matters in conflict, it is not considered appropriate to hold this investigation as a matter of interest in the official records of either CDR Lademan, the CO of *LUCE*, or L. T. Brenner. * * *.

Plaintiff was considered but not recommended for promotion to lieutenant commander by a selection board which met from September 21 to October 22, 1965. This was not considered a "pass-over" on plaintiff's records, since plaintiff was below-the-promotion-zone on that occasion.

Plaintiff was thereafter considered for promotion to lieutenant commander by two successive selection boards which met from September 27 to November 10, 1966, and from October 3 to November 21, 1967. He was passed over by each of these selection boards, and under the provisions of 10 U.S.C. § 6382 (1964) a second pass over for selection to lieutenant commander automatically results in separation the next succeeding June 30.[1]

In summarizing plaintiff's 22 periodic fitness reports throughout his 10 years of active duty in the Navy, the trial judge found, in pertinent part, as follows:

> 23. (i) The plaintiff seemed capable of high achievement on many occasions, as witnessed in the honors and commendations which he won directly or indirectly * * *. While the plaintiff's ratings for the various categories would vary from period to period, or from rating officer to rating officer, the impression is gained from a close study of all of his fitness reports that the plaintiff excelled in such matters as ship handling, seamanship, gunnery, military bearing, loyalty, and self-expression, while he was sometimes average or less in matters of judgment, reliability, cooperation, and compassion with subordinates.

On December 6, 1967, after having been passed over by the second selection board, and having been transferred to a Navy Sub-Board of Inspection and Survey at Newport Naval Base, plaintiff requested an early discharge and a commission in the Naval Reserve. Plaintiff was honorably

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[1] 10 U.S.C. § 6382(a) (1964) provides:

"§ 6382. Regular Navy, lieutenants and lieutenants (junior grade); Regular Marine Corps, captains and first lieutenants: discharge for failures of selection for promotion; severance pay.

"(a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, and each officer on the active list of the Marine Corps serving in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time. However, if he so requests, he may be honorably discharged at any time during that fiscal year."

discharged June 7, 1968. Plaintiff testified that if he were offered reinstatement in the Navy he would decline; that his age, lengthy interruption of active duty, and the ineradicable blotting of his copy book would make his advancement too unlikely as a retread; and that he is now selling real estate.

The plaintiff contends that his pass-overs for promotion to lieutenant-commander by two successive selection boards, which made discharge by the following June 30 mandatory under 10 U.S.C. § 6382, were arbitrary, capricious, and contrary to law. He also contends that in the course of his appearance before a board of investigation by which he was tardily designated as a Party in Interest, the board's proceedings, its recommendations, the issuance of a punitive letter of censure in the degree of admonition by the convening authority, the difficulties unfairly imposed on his efforts to obtain a time extension to appeal from the letter of censure, the ultimate withdrawal of the letter of censure and its substitution by an equally damaging letter of instruction for lodging in his official records, and the publicizing of these records by actions of the convening authority, violated his rights to due process guaranteed by applicable provisions of the Manual of the Judge Advocate General and of the Uniform Code of Military Justice.

The particular relevance of the plaintiff's due process contention, especially as to the board of investigation phase, is not apparent. The plaintiff is not basing his cause of action in this case on what the board of investigation did. Accordingly, if there were any due process violations by the board of investigation, they would not be relevant, germane, nor controlling. In that regard, the cases of *Conn* v. *United States*, 180 Ct. Cl. 120, 376 F. 2d 878 (1967), and *Cole* v. *United States*, 171 Ct. Cl. 178 (1965) are clearly distinguishable. As stated above, this is not an illegal discharge proceeding per se where alleged due process violations are important. Rather, it is a proceeding to void plaintiff's pass-overs by the two selection boards because they are alleged to have improperly considered, with relation to plaintiff's promotion prospects, certain derogatory material which should not have been before them, material which might warp their judgment. This opinion is confined and limited to a consideration of that issue.

As long ago as *Reaves* v. *Ainsworth*, 219 U.S. 296 (1911), as explicitly as *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), *Norman* v. *United States*, 183 Ct. Cl. 41, 392 F.2d 255 (1968), *cert. denied* 393 U.S. 1018 (1969), *Clinton* v. *United States*, 191 Ct. Cl. 604, 423 F. 2d 1367 (1970), *Arnheiter* v. *Chaffee*, 435 F. 2d 691 (9th Cir. 1970), and *Payson* v. *Franke*, 282 F. 2d 851 (D.C. Cir. 1960), *cert. denied*, *sub nom. Robinson* v. *Franke*, 365 U.S. 815 (1961), and as recently as *Muldonian* v. *United States*, 193 Ct. Cl. 99, 432 F. 2d 443 (1970), the Federal courts have held in forthright terms and under varying factual contexts that they have neither power nor inclination to review military discretion in failing to assign, commission, or promote officers because, as stated in *Orloff* v. *Willoughby*, *supra*, at 93, 94:

> * * * judges are not given the task of running the Army. * * * The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. * * *

The given reason for this hands-off policy is particularly valid with respect to the recommendations of selection boards for officer promotions, for the record of an individual on the list of eligible candidates is to be contrasted with similar records of the often hundreds of other candidates on the same list. "* * * The criteria [*i.e.*, for promotion] were for the board in its sworn judgment to apply for the good of the service. Suffice it to say that we are in no position to assess and appraise that record by itself even were we free to do so." *Payson* v. *Franke*, *supra*, at 854.

Selection boards are composed of carefully chosen senior officers. Precautions are taken to avoid placing in a candidate's file and available for inspection by the boards material which is unfairly prejudicial or derogatory to the candidate, such as incomplete investigations to which he is a Party in Interest. The proceedings of selection boards are secret. No record is kept as to precisely what data beyond fitness reports and the individual's personnel file the boards might consult or know about. A selection board must be provided with the names of all officers in the promotion zone and the records of all candidates are furnished to the board.

10 U.S.C. § 5706(10)(11). At the time the selection boards involved in this case met, an officer's record, as specified in Article B–2201 of the Bureau of Naval Personnel Manual, consisted of the following:

B–2201. OFFICER'S RECORD

(1) An officer's record maintained in the Bureau of Naval Personnel is intended to reflect the official history of his career in the Navy. It is the property of the Government and not of the officer concerned. This official record maintained for each Navy and Naval Reserve officer contains any document which bears or reflects on the character, performance, professional qualifications and fitness of the officer. It is composed of the following files and includes, but is not limited to, the documents indicated:

(a) Fitness Report Jacket—

1. Reports of fitness.

2. Letters attached to and officially submitted as a part of fitness reports.

3. Photographs.

4. Statements regarding unsatisfactory fitness reports and acknowledgment of any unfavorable matter therein.

(b) Selection Board Jacket—

1. Certificates: Birth, citizenship, education and training. Commissions, appointments, acceptances, waivers, oaths of office, classification changes, records of emergency data, Statement of Personal History (DD Form 398), certificates of security clearance, and documents certifying completion of security investigative requirements.

2. Copies of citations, awards, and letters of commendation or censure.

3. Reports of physical examination, medical surveys, personal biographies, transcripts of service, applications for commission, notices of separation, requests for change of duty and tenders of resignation, retirement requests, and other voluntary applications for separation from active duty.

4. Written communications from the officer concerned inviting the attention of the selection board to matters of record.

5. Statements of the officer in reply to adverse matter in his selection board jacket.

6. Extracts from the findings and recommendations of courts and boards concerning the officer. These include statements of disciplinary action and promul-

gating letters of general courts-martial. Complete records of proceedings of courts-martial, inquiries, investigations, etc., are filed in the Office of the Judge Advocate General.

(2) *Promotion Examinations.*—Completed promotion examinations are filed in the Office of the Judge Advocate General.

(3) *Access to officer's record.*—(a) Access to the record of an officer is given only to the officer personally, to the clerk of a court of competent jurisdiction in response to a valid order from that court, to the officers of the Navy Department for use in the transaction of official business, and to the representative of the officer upon presentation by such person of a written authorization from the officer concerned.

(b) The record of an officer shall be available for inspection by him or his duly authorized agent, designated as such by him in writing.

(c) The record of an officer being considered for selection is available to the selection board for use in its deliberation.

(4) *Incorporation of matter into officer's record.*—(a) Any matter that is rightfully placed in the official record of an officer may not be removed except by special authorization of the Secretary of the Navy. The record is permanent. Each day of his service career the officer is building up material for his record which, when properly entered, is there to stay. A fitness report once submitted to the Chief of Naval Personnel becomes the property of the Navy Department and is not subject to change; however, a controversial report may be amended by correspondence forwarded via official channels, such correspondence to be attached to and made a part of the report in question. His record is reviewed when any change in his status is contemplated, such as assignment to duty, special details, examination for promotion, trial by general court-martial, or disciplinary action by the Chief of Naval Personnel, and it is of particular importance in the selection for promotion to the higher grades. In other words, in furnishing the material for his record the officer is daily adding to the evidence that is the basis of his personal and professional reputation in the service.

(b) It sometimes happens that officers either do not put forth their best efforts or fail in the strict observance of the naval code, with no intention of being lax in the discharge of their responsibilities or careless in their conduct, and without a full realization of the conse-

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quences. A mass of unfavorable matter, even though the separate entries are not in themselves of a grave nature, will naturally build up a prejudice against an officer which, in the aggregate effect, may be as detrimental to him in the years to come as a conviction by a general court-martial.

(c) Pursuant to United States Navy Regulations, adverse matter shall not be placed in an officer's record without his knowledge. In all cases it shall be referred to the officer reported on for such official statement as he may choose to make in reply. If the officer reported on desired to make no statement, he shall so state officially in writing. The Chief of Naval Personnel is liberal in his interpretation as to what constitutes adverse matter.

(d) No anonymous communications are made a part of an officer's record.

(5) *Confidential matter.*—Correspondence of a confidential nature from any source pertaining to an officer's record is filed in the personal custody of the Head, Officer Records Branch, Bureau of Naval Personnel. In the majority of cases, there is no confidential matter pertaining to the officer, and consequently no confidential file. Matter of an unfavorable nature is first referred to the officer concerned before filing. Access to an officer's confidential file is allowed as specified in paragraph (3) of this article, but authority must be granted by the Chief of Naval Personnel or the Acting Chief of Naval Personnel in each case in order to safeguard the individual officer's interests and the security of certain private or confidential matter.

A selection board may not consider anything not authorized by the foregoing regulations. As may be seen from such regulations, an officer's record may be inspected by him or his authorized representative. He may communicate with the board in accordance with 10 U.S.C. § 5755 inviting attention to any matter of record in the Department of the Navy concerning himself. Adverse material or information is not placed in his record without his knowledge. If any adverse reports are proposed to be included in his fitness reports, the officer involved must be so advised, and he is given an opportunity to comment on such material or information at the time it is forwarded for inclusion in his jacket. It is within the discretion of the Chief of Naval Personnel as to what constitutes adverse matter.

The governing statute applicable to selection boards provides that each member of the board "shall swear that he will, without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the naval service, perform the duties imposed upon him by law." It is clear from the provisions of this law that the special fitness of officers and the efficiency of the naval service are of paramount importance in the selection for promotion process. The members of selection boards are officers with expertise in these fields.

In the instant case, the burden was on the plaintiff to show that one or both of his selection boards knew about and considered adverse evidence that was not in his record as defined above in the quoted provisions of the Bureau of Naval Personnel Manual. This he has failed to do. Although the plaintiff alleged that his selection boards knew about and considered the proceedings of the board of investigation, the record thereof and the decision it reached, there is no proof that any of this occurred. In fact, the evidence is to the contrary. It is true that there were two references in his fitness reports that he had been a party to an investigation, one being by Commander Drake as a rating officer as a part of his official duties, and the other by Admiral Eli T. Reich in a letter of October 2, 1967, in plaintiff's behalf to the 1967 selection board. Neither reference gave any details about the investigation nor the results of same. These references were properly in plaintiff's fitness reports. It will be recalled that the plaintiff asked to be made a party to the investigation, although he tried unsuccessfully later on to withdraw the request. The letter from Admiral Reich could hardly be considered adverse to plaintiff because it recommended that plaintiff be promoted to lieutenant commander and referred to him as "an outstanding young officer whom I felt had great potential."

Plaintiff's personnel file that was before both selection boards contained the Security Termination Statement issued to plaintiff on February 17, 1966, which mentioned that he had been a party to an investigation. It was proper for this

statement to be in his personnel file and the selection boards were entitled to consider it.[2]

The plaintiff also alleged that both selection boards knew about and considered the punitive letter of censure issued to him by Admiral Ruckner which was later withdrawn and destroyed, as well as the letter of instruction issued to him by Admiral Ruckner. There is no proof that the boards knew about or considered either of these letters.

We conclude that the selection boards did not select the plaintiff because of the contents of his fitness reports and personnel files as compared to those of other candidates, and that they did not consider any evidence outside of those reports and files. Some of the fitness reports were critical of the plaintiff. One such report was filed by Commander Lademan for the period July 1, 1965, to February 19, 1966, in which plaintiff was criticized for his proneness to antagonize others, and in which he was given next to the lowest rating available. The plaintiff answered this criticism and Commander Lademan defended his criticism in writing. It is true that the plaintiff had received many awards and citations and top ratings for excellent service during his career. Our trial judge found that:

> * * * [O]n the plus side the plaintiff impressed many of his rating officers as energetic, highly motivated, ambitious, dedicated, alert, intelligent, enthusiastic, resourceful, and highly qualified in ship handling, seamanship, and gunnery. On the minus side the plaintiff impressed some of his rating officers as being undiplomatic, dictatorial to subordinates, bored with routine duties, lacking judgment, impulsive rather than thoughtful. * * *

This was the situation when the selection boards convened. The first board was given a quota of 324 promotions to lieutenant commander. Eighty to ninety percent of the candidates were selected for promotion. The second board had a quota of 943 promotions with a limit of five percent of the officers

[2] The fact that plaintiff's files showed that he had been a party to an investigation did not automatically prevent his promotion. This is shown by the promotion of Commander Lademan who was a party to the same investigation and whose files revealed this fact.

who had been passed over once before. It selected eighty to ninety percent of the candidates. The plaintiff was passed over both times.

We must assume in the absence of evidence to the contrary that the members of these selection boards performed their duties as officers of the government in a fair and impartial manner and in accordance with law, and that in so doing they gave the plaintiff due and proper consideration along with all of the other candidates for promotion. It is obvious that this promotion procedure has a certain amount of "built-in" attrition, because all the officers considered cannot be promoted. No doubt the system is designed to encourage officers to render the best possible service at all times so that they may be selected for promotion when the time comes for them to be considered. It is natural and understandable for an officer, such as the plaintiff, who has been passed over, to feel that improper evidence was considered by the boards. However, it is quite a different thing to prove that such was the case.

The reluctance of the judiciary to review the promotion actions of selection boards is rooted not only in the court's incurable lack of knowledge of the total grist which the boards sift, but also in a preference not to meddle with the internal workings of the military. The latter would not be sufficient by itself to deter judicial review, for with great frequency this and other Federal courts entertain claims based upon illegal discharges, failure to award disability retirement pay, and occasionally collateral attacks on court-martial convictions, all of which involve internal affairs of the military services. But in such cases the records available for judicial scrutiny are more finite and identifiable than are the deliberations of selection boards in discharging their promotion responsibilities, which are shrouded in mystery and imponderables. In *Ricker* v. *United States*, 184 Ct. Cl. 402, 396 F. 2d 454 (1968), the court set aside the action of a Navy promotion board in failing to continue the plaintiff in service because the board was illegally constituted, a clue as to the court's willingness to review promotion actions for procedural regularity.

The plaintiff relies on the cases of *Weiss* v. *United States*, 187 Ct. Cl. 1, 408 F. 2d 416 (1969); and *Clinton* v. *United States*, 191 Ct. Cl. 604, 423 F. 2d 1367 (1970). However, those cases are distinguishable. In the *Weiss* case the Board for the Correction of Naval Records had recommended that Weiss' records be corrected to reflect that he was not reported unsatisfactory by the selection board, but the recommendation was disapproved by the Under Secretary of the Navy. The court held that the action of the Under Secretary was improper and ruled for the plaintiff. The plaintff in the case before us did not apply to the Correction Board to change his record.

In the *Clinton* case a correction board changed an officer's record to remove a first pass-over by an Air Force selection board because the selection board wrongfully considered certain derogatory material that prejudiced the officer's selection. None of these facts exist in the instant case.

The plaintiff also cites the case of *Rawlins* v. *United States*, 197 Ct. Cl. 972 (1972). That case is a report of a review panel of three commissioners of this court on referral from the United States Senate pursuant to 28 U.S.C. §§ 1492 and 2509. The commissioners found that the plaintiff, Commander Rawlins, had an equitable case *but not a legal case*, because he had not been promoted to captain due to an erroneous and arbitrary fitness report. That case is not a precedent binding on this court. Furthermore, the decision militates against the plaintiff in the instant case rather than for him.

The plaintiff asks this court to promote him to the position of lieutenant commander, and to award him back pay in that rank from the time he would have been promoted to that rank, and pay for the rank he would have acquired until his normal and natural retirement from active service, plus retirement pay as a retired Navy officer. Such a recovery is beyond our power to grant. Federal courts have held many times that they are not in the military "promotion business." We adhere to that principle.

The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to

resolve and pass upon the highly complicated questions and problems involved in the promotion procedure, which includes, but is not limited to, an analysis of the fitness reports and personnel files and qualifications of all of the officers considered, which in our case amounted to 1,267 officers in the 1966 and 1967 meetings of the two selection boards. The Supreme Court expressed these principles very well in the case of *Orloff* v. *Willoughby*, *supra*, a portion of which opinion is quoted above.

We hold that the actions of the selection boards in 1966 and 1967 in not recommending plaintiff for promotion were not arbitrary, capricious, or contrary to law, and that plaintiff is not entitled to recover any active duty pay or retirement pay, and that judgment is hereby rendered for the defendant and plaintiff's petition is dismissed.

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NICHOLS, *Judge*, concurring:

I concur in Judge Skelton's opinion and in the judgment of the court. Whether plaintiff has an equitable claim is not properly before us, as it might have been had he applied to the Board for Correction of Naval Records and been turned down. *Cf. Rawlins* v. *United States*, 197 Ct. Cl. 972 (1972). The reporting tribunal in a Congressional reference case there held as to a claim much like that herein, that the Navy should have allowed Rawlins' claim to go before such a Board. Thereby a route exists for getting equitable claims before this court without special legislation. *Cf. Kaesserman* v. *United States*, 202 Ct. Cl. (No. 292–69, order dated June 1, 1973). A refusal by a Board to correct an "injustice" may be reversed as arbitrary and capricious although we could not grant relief directly. For reasons to be shown, however, the proof of even "injustice" would have to be clearcut in a way the instant claim probably would not satisfy. As a legal claim it manifestly fails.

However, despite its weaknesses, the instant claim does trouble the conscience. The statutory selection procedures at times expose promising careers to some degree of blind chance. An officer has no way to request that his name not go before Selection Boards when he is in the "promotion zone" but temporarily under a cloud. If he is ultimately exonerated,

he may have been passed over meanwhile and have no remedy. True, the officer's written record may have been carefully sanitized to avoid revealing the cloud. Defendant has not pointed out any regulation or instruction that bars Selection Board members from bringing into Board deliberations what they already know. They are not, jurymen, directed to disregard what they have heard outside the court or read in the papers. As I understand it, use of these Boards dates back to a time when the officer corps was so small that its members all knew each other personally. A man's word of mouth service reputation not only was allowed to be considered in the decision whether he was to be promoted, it was expected to be the decisive factor. I tried to smoke out defense counsel in this case, whether the above remains true to any extent, but do not feel completely enlightened by the responses received.

Defendant says, (Supplemental Memorandum, p. 3):

> Therefore, it would appear to be appropriate to say that in its consideration of records a selection board would incorporate the experience in the naval service of those officers on the board *and their views as to which officers are best suited for promotion.* (Emphasis supplied.) That subjective judgment is combined with the objective records in reaching a decision. Article B-2201 of the Bureau of Naval Personnel Manual (DX 9, 10) sets forth therein a list of files which compose [comprise?] an officer's record "but is not limited to, the documents indicated."

I take it this means that an officer's "record" consists of (a) certain formal documents, as assembled in a file jacket for the Board, and (b) such ideas and impressions as members of the Board may have formed about the officer's fitness, in course of their normal naval experience. But I find it all very vague and indefinite. Lacking knowledge of what a Selection Board "knows" of a candidate for promotion outside the file jacket, we could not tell whether material in that jacket was in fact prejudicial, even if we knew what it was.

It is probably true, as we were told in one of our cases, that the hazards of destruction of a career by such blind chance are greater for the young man or woman who aspires to rise in corporate management, finance, the media, (or, God forbid the law!) than they are in the Navy. Some exposure to

unmerited catastrophe seems a necessary concomitant of any occupation that provides an adequate amount of upward mobility, to attract the career-oriented person. One who is security-oriented can select the Civil Service. He cannot demand in the same career the glitter and glory of an admiral and the job security of a customs inspector.

The Selection Board system succeeded promotion by seniority, where all one needed to make admiral was a sound stomach, and a talent for staying out of jail. We don't want that system back. Selection Boards are impartial, institutionalized and regular, in contrast to private industry, where mere whim and caprice—or raw financial power—may decide who gets the six figure salary, and who gets the axe. We don't want that either. You could not impose due process on Selection Boards without destroying their essential character. Naval officers need to be able to rely absolutely on other officers in other ships, to believe utterly in their reports, to know exactly how they will respond to particular orders, or to possible emergencies. If naval officers have a gut feeling, based on evidence or experience, that X cannot be depended on, their own efficiency is impaired so long as X holds command rank. I would not therefore, in a judicial capacity, do anything to prevent these gut feelings from having some effect on the decision whether X is promoted or passed over, unless they infringe on constitutionally protected rights. If, as d. v. I won't, I should have to serve as a draftee in another war, I would hate to be on board a ship whose commander owed his rank and position to the fact his Selection Board was not allowed to consider anything but a sanitized official file. Let us not forget the right of enlisted men, serving under these officers, not to be led into another Pearl Harbor.

Assuming that Mr. Brenner was passed over in light of the dropping of the missile and the subsequent investigation, we do not know whether a full knowledge would have made any difference. We do no know whether any of those selected for promotion had had such misfortunes. The quota of selections for promotion might have been filled with officers under no cloud at all, not even a little one. Both Boards had the notice of the termination of plaintiff's security clearance. There is no finding that it was ever restored. It is difficult to

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believe a Selection Board would ever select for promotion an officer who was not cleared for security, for whatever reason. What it adds up to, we have no showing that the actual Boards, if with imperfectly sanitized records, were more prejudiced against plaintiff than would have been (a) a Board with full God-like knowledge of everything that happened during, and as a result of, the missile dropping incident, or (b) a Board with no knowledge whatsoever except of plaintiff's service reputation in general. This is not the clearcut showing of error that would warrant interference by a court. It does not seem to me the trial judge's efforts to determine just what prejudicial documents were before the Boards could have led to anything determinative of the case in the circumstances that were before him, where plaintiff's troubles were matters of common notoriety.

In *Weiss* v. *United States*, 187 Ct. Cl. 1, 408 F. 2d 416 (1969) they put in prejudicial material and left out exonerating material, as was clearly established. The preferred alternative there would have been, not to blind the Board as to plaintiff's troubles, or try to, but to give it the full picture, including the disapproving endorsements of the higher command on the Board of Investigation report, which had accused Weiss of currency irregularities. We so intimated. Viewing the case in retrospect, it certainly seems that any attempt to protect Weiss by keeping all references to his currency involvement out of his file jacket would have been of doubtful benefit to him, though his alleged offense had not, so far as the record showed, the word-of-mouth notoriety of Brenner's. Our trial judge therefore was in error in saying a common feature of Brenner's and Weiss's cases was the "presence before the Selection Boards of derogatory material that should not have been there." Slip op. p. 7. Assuming, as the trial judge does, that our intimation in *Weiss* is more than ordinary dictum, it only stands for the proposition that extant derogatory material in a file jacket must be offset by likewise extant exculpatory material, of equal or greater dignity. It does not demand the seemingly hopeless undertaking of denying a Selection Board all knowledge of an officer's involvements in alleged discreditable activities, which are matters of common notoriety.

I therefore believe the wrong, if there was one, to Brenner, is not correctible by judicial review. It lay, essentially, in legislation forcing his name before Selection Boards at a time when he was a party to an investigation not yet finalized as to top level approval of its conclusions. For the future, the prevention of injustices of this kind is a matter for Congress to weigh. There may be reasons I am not aware of, why holding back of names of those similarly situated with Brenner, for future Boards, is not feasible.

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DAVIS, *Judge*, dissenting:

After a full hearing, Trial Judge Bernhardt found that there was present before the 1966 and 1967 selection boards "material which should not have been before them," preventing the record considered by those boards from being "free from bias and distortion."[1] The trial judge's detailed findings (now partially modified by the court) support this conclusion. I accept these determinations. "Under our rule, the commissioner's [trial judge's] findings of fact are presumed to be correct because of his opportunity to hear the witnesses and to determine the weight to be accorded to their testimony. A party who undertakes to overcome this presumption must make a strong affirmative showing to the contrary." *Hebah v. United States*, 197 Ct. Cl. 729, 732, 456 F. 2d 696, 698, *cert. denied*, 409 U.S. 870 (1972). In this case, though there may be room for some doubt I am not at all convinced that the preponderance of the evidence goes against the trier's determination, nor do I believe that the Government has made a strong affirmative showing that he was wrong. To

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[1] In a related part of his opinion, the trial judge said: "The evidence in Brenner's case is somewhat murky as to precisely what material his Selection Boards considered relating to his Board of Investigation participation and the subsequent censure, but the wide distribution of the damaging Board of Investigation record throughout the missile Navy, the deposit of the entire record and its sequelae with Navy JAG and submission of that record to BuPers for deposit in plaintiff's official record as a 'matter of interest' at the direction of the admiral who had convened the Board of Investigation (although BuPers declined to retain the record after both of plaintiff's successive Selection Boards had passed him over), [footnote omitted] produces the circumstantial but entirely reasonable conclusion that plaintiff's Selection Boards were sufficiently imbued with derogatory data concerning the plaintiff's Board of Investigation involvement to influence their judgment to the detriment of plaintiff's chances for promotion to lieutenant-commander."

me, it does not seem unlikely that the boards knew more than they should about the proceedings and consequences of the board of investigation, including the withdrawn letter of censure and the substituted letter of instruction.

The question then becomes whether it was material error for the boards to have had and considered this information. I wholly agree with the majority that a selection board is forbidden to consider anything not authorized by the governing statute and regulations, and I am of the further view that a board's actions on the basis of an improper "record" are invalid. *See Weiss* v. *United States*, 187 Ct. Cl. 1, 15, 408 F. 2d 416, 423 (1969) (concurring opinion). The whole structure of the selection-board system—as established by the statute and regulations—contemplates that the officer will know what derogatory information is to be weighed and will have a chance to respond to it. The regulations carefully delimit what the officer's record shall consist of, and they make a special point of declaring that "[a]dverse matter shall not be placed in an officer's record without his knowledge" and that "[n]o anonymous communications are made a part of the officer's record." Communications which are not part of the regular personnel file are excluded from the material given to the board, unless perhaps they contain nothing derogatory.

Under this regime, the board members are to decide on the basis of the information in the folders put before them. They are not to be influenced by personal preferences, unsubstantiated hearsay, gossip, rumor, or even general reputation which is not reflected in or supported by the fitness reports and other papers before them.[2] According to the regulations, the officer's official record maintained in the Bureau of Naval Personnel is supposed to incorporate and reflect "the official history of his career in the Navy."

If one accepts, as I do, the trial judge's findings, there is no doubt that Brenner's selection boards had access to and took account of material not properly a part of this official history. Neither the proceedings nor the report of the Board

[2] No Navy directive, regulation, or authoritative statement has been presented to us which states or implies that board members may consider any specific information about the officer which is not reflected in the record before them. The whole tenor of the statute-plus-regulations is to the contrary.

of Investigation were includable in the proper selection board record because the inquiry proceeding—which there is good reason to believe was procedurally defective—was still incomplete and unreviewed. Admiral Ruckner himself wrote to plaintiff (early in 1967) that substantial new evidentiary matters presented in plaintiff's appeal mitigated the dereliction alleged and would have possibly averted action of a punitive nature if such matters had been available to the Board of Investigation. As for the letters of censure and instruction, they too should not have been seen. The first was wholly withdrawn and the other was barred by Navy directive from inclusion in the record. The JAG Manual, § 0101(c), Change 16, March 29, 1966, provided that nonpunitive letters of censure are not to be included in the officer's personnel file, and this of course would likewise apply to letters of instruction, a milder form of sanction. Plaintiff did not know that any of these materials was to be taken into account, and he had no opportunity to explain the situation from his own standpoint.

The applicable rule was well stated by the court, by way of considered dictum, in *Weiss* v. *United States*, *supra*, 187 Ct. Cl. at 7, 408 F. 2d at 419: "But the selection procedure must follow the law. The documents which are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record. If a Service Secretary place before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes."

In my view, that is precisely what happened here (as it did in *Weiss*). It follows that plaintiff was illegally passed over, twice, by the invalid decisions of the selection boards, and as a direct consequence was illegally separated. The statute does not authorize separation unless the officer is lawfully passed over. Plaintiff is therefore entitled to recover, but I agree with the trial judge and the court that he could not obtain more than the pay of the grade at which he was discharged. We cannot say that, if the selection board pro-

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ceedings had been entirely proper, he would necessarily or even probably have been promoted. But we can and should say that he should not have been discharged as the result of invalid selection board determinations.

LARAMORE, *Senior Judge*, and KUNZIG, *Judge*, join in the foregoing dissenting opinion.

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FINDINGS OF FACT

1. Plaintiff, born August 25, 1935, served in the United States Marine Corps Reserve from August 29, 1952, graduated from high school in 1954, and from active duty in the Marine Reserves won a competitive appointment to the United States Naval Academy, Annapolis, Maryland, standing within the top 160 authorized competitive appointments for enlisted members of the United States Navy and Marine Corps Reserves. He graduated from the Academy on June 4, 1958, with a Bachelor of Science degree, and was commissioned as an ensign. He was promoted to lieutenant (j.g.) on December 4, 1959, and to lieutenant on March 25, 1967 (effective retroactively to June 1, 1962). He was honorably discharged effective June 7, 1968.

2. During his naval career he was assigned sea duty on several destroyers and guided missile frigates, serving successively as antisubmarine warfare officer, gunnery officer, missile officer, assistant weapons officer, and weapons officer. He also had shore assignments as Training Program Manager for the Navy's Terrier Guided Missile Program, Dam Neck, Virginia, for 2 years, was stationed at the Bureau of Naval Personnel (BuPers) in Washington, D.C., on the Navy's Surface-to-Air Guided Missiles Systems, and in December 1966 he commenced what eventually proved to be a terminal assignment with the Navy Sub-Board of Inspection and Survey at Newport, Rhode Island.

3. During his naval service plaintiff received various commendations, honors, and praise:

(a) On July 1, 1965, while serving on the *U.S.S. Luce* plaintiff was qualified as CIC watch officer and command duty officer by Comdr. Lademan, commanding officer of the *U.S.S. Luce*. In making these certifications to plaintiff,

Comdr. Lademan recognized plaintiff's "demonstrated ability and sound judgment", stating as to the former that he had "complete confidence * * * in your ability to handle the ship under all conditions.", and as to the latter that "This watch qualification [actually referring to the qualification as command duty officer] is the highest attainable aboard *Luce* and represents the complete confidence of the commanding Officer in your ability to represent him as necessary in all matters administrative and operational * * *." This was the same Comdr. Lademan who, as plaintiff's rating officer, made out plaintiff's fitness report for the period from July 1, 1965 to February 19, 1966, and whose comments therein as to plaintiff's character were incompatible with his remarks of July 1, 1965, quoted above. (See finding 23(k), *infra*.)

(b) On December 2, 1966, Admiral Ruckner, the commanding officer of the Cruiser-Destroyer Force, U.S. Atlantic Fleet, commended the commanding officer of the *Luce* and his crew for the excellent rating given the ship during maneuvers on November 22 and 23, 1966, noting vast improvement in performance of its nuclear weapons mission. At that time the plaintiff was weapons officer of the *Luce* and his performance as such was largely responsible for the commendation. (Admiral Ruckner on May 11, 1966 had issued a letter of censure to plaintiff, and withdrew it on January 28, 1967 (finding 19(c), *infra*).

(c) On September 18, 1967, Comdr. J. C. Drake, then commanding officer of the *Luce*, issued plaintiff a Letter of Commendation which read in part as follows: "In Weapons Department evolutions, your demonstrated ability throughout the competitive year was noteworthy. * * * In your capacity as Weapons Officer, you made a personal and direct contribution toward the winning of this award [*i.e.*, Departmental 'E' for Excellence awarded by Admiral Ruckner to the *Luce*, the only missile type destroyer so honored]." On that occasion the plaintiff was commended for "outstanding performance of duty. * * * *Well done!* * * * A copy of this letter will be made a permanent part of your service record." Another undated commendation by Comdr. Drake to plaintiff was for his "individual performance and achievements" as weapons officer during the period July 1, 1966 to

November 28, 1966, on the *Luce* which "contributed measurably" during the fiscal year ending June 30, 1967, to the *Luce* winning several outstanding performance awards.

(d) On October 2, 1967, Admiral Eli T. Reich wrote to plaintiff's 1967 Selection Board recommending favorable consideration of plaintiff's promotion to lieutenant-commander referring to plaintiff as an "outstanding young officer whom I felt had great potential," and to his contribution as weapons officer to the winning by the *Luce* of a Weapons "E". This letter, which refers to a missile mishap during plaintiff's tenure as weapons officer of the *Luce*, which resulted in an investigation, was available for examination by plaintiff's 1967 Selection Board (see finding 31, *infra*).

(e) On April 12, 1962, Admiral Sends congratulated the commanding officer, officers and crew of the *U.S.S. Dewey* for their "splendid performance" in solving the problems plaguing the Terrier weapons system. "A sincere well done." Plaintiff at the time was missiles officer for the *Dewey* and an authority on the Terrier missiles, and therefore was instrumental in the earning of the commendation.

(f) On June 12, 1963, Office of the Chief of Naval Operations complimented plaintiff for his authorship of an article entitled "The Terrier BT–S" for publication in COMBAT READINESS.

(g) On July 27, 1960, the commanding officer of the *U.S.S. Blandy* (DD–943) on which the plaintiff was the antisubmarine warfare officer, issued a commendation to plaintiff for his "outstanding performance of duty" in that capacity from May 1959 until March 1960. The *Blandy* had won the Antisubmarine Warfare Departmental Excellence Award for fiscal year 1960 for demonstrating "that she was one of the most effective ships of her class [destroyer] in DESLANT in over-all ASW readiness."

(h) On August 16, 1960, the plaintiff was issued a commendation by the commanding officer of the *Blandy* for his "substantial contribution" to the award of a Battle Efficiency Plaque to the *Blandy* for fiscal year 1960.

(i) The commendations and complimentary references described in paragraphs (b), (c), (e), (f), (g) and (h) of this finding were permanently placed in plaintiff's file of fitness reports and were available to future Selection Boards.

4. Plaintiff was assigned as weapons officer to the *U.S.S. Luce*, a guided missile destroyer then under the command of Comdr. Lademan, reporting there May 23, 1965. On January 19, 1966, while the *Luce* was anchored at Mayport Naval Air Station, Florida, a nuclear-armed surface-to-air guided missile known as the Terrier was dropped on the deck of the *Luce* from a height of several feet while being routinely handled. The Terrier is 27 feet in length and 1½ tons in weight. The missile did not explode. Demolition crews removed it. There were no injuries. There was considerable publicity over the accident because of its potential consequences, although the Navy officially reported that because of the construction of the Terrier there was no risk of an explosion. As weapons officer the plaintiff had technical responsibility for the incident, whether or not he was negligent, according to the military rule of command responsibility.

5. Several official investigations were conducted of the missile accident circumstances referred to in finding 4, *supra*. One was by Comdr. Lademan, commanding officer of the *Luce*, assisted by Lt. Comdr. Kosmela, his executive officer. Another was by the Bureau of Weapons. Another by the Bureau of Ships. The principal investigation was by an Informal Board of Investigation.

6. At the instance of Admiral Ruckner (finding 3(b), *supra*), an Informal Board of Investigation convened January 22, 1966, and adjourned February 17, 1966. The Board consisted of three members (Capt. Schremp as senior member, assisted by Capt. Upshaw and a third member). The Board had subpoena power and authority to swear witnesses. A number of officers and enlisted personnel aboard the *Luce* testified *in camera*. The plaintiff was not present or represented at their testimony. Comdr. Lademan was present throughout the Board sessions. Plaintiff appeared voluntarily before the Board on Saturday, January 29, 1966, and testified at great length until fatigued when the Board recessed at 11 p.m.

7. On the next day, Sunday, January 30, 1966, without being fully cognizant of the nature and scope of the Board investigation, and without representation by counsel, plaintiff requested that he be made a Party to the investigation. No action could be taken on the request due to the absence of

a third member of the Board. Plaintiff then conferred by telephone with his father, who was a lawyer and a retired (1958) Marine legal officer, who told him that he had perhaps been premature in requesting to be made a Party, and suggested that plaintiff merely continue to cooperate with the Board proceeding.

8. On Monday, January 31, 1966, plaintiff withdrew his request to be made a Party, and advised the Board that he wanted to continue to cooperate informally with the investigation without becoming a Party. Capt. Schremp advised him that he could not act on the withdrawal request in the absence of the third member of the Board. The next meeting of the Board was scheduled for February 7, 1966. Plaintiff left on January 31 for a 5-day cruise on the *Luce*. While at sea he was sent a dispatch advising him that he had been made a Party to the investigation "at his request." [1]

9. The principal rights of a Party in Interest to an investigation are:

(a) to be given due notice of designation as such.

(b) to be present during proceedings, except deliberations.

(c) to be represented by counsel.

(d) to cross-examine witnesses.

(e) to introduce evidence.

(f) to testify as a witness.

(g) to refuse to incriminate oneself.

(h) to make an argument at close of evidence.

10. Upon plaintiff's being made a Party to the investigation. Lt. Roy Olson was assigned as his military counsel. Plaintiff's father, Lt. Colonel Ernest Brenner, USMR, was permitted to act as plaintiff's individual counsel to assist Lt. Olson. Capt. Schremp advised plaintiff that the Board was investigating the incident simply to find facts, and that probably no more than a letter of censure would result.

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[1] These two sentences are based on allegations in paragraphs 11 and 12 of the petition which defendant admitted in its answer. However, plaintiff's exhibit L, "Party's Written Acknowledgement of Advice on Rights and Waivers Thereof" dated February 4, 1966, bears the typed signature of plaintiff witnessed by the typed signature of Capt. Upshaw, a member of the Board. It appears to be a conformed copy of an original and, if so, represents that plaintiff accepted his designation as a Party at a time when the admission in the pleadings has him at sea. The conflict is curious but not important.

**11.** At the resumption of the Board proceeding on February 9, 1966, the plaintiff was called as a witness. On advice of counsel plaintiff declined to testify. Plaintiff did not testify, but he and his counsel attended the remaining Board sessions until it adjourned February 17, 1966. On that date the plaintiff's security clearance was terminated.

**12.** Comdr. Lademan was also a Party to the investigation and attended all of the Board sessions represented by counsel. He was selected for a "due course" promotion to captain by the Selection Board that met in the late summer of 1966, having not been passed-over by any prior Selection Board. His executive officer, Lt. Comdr. Kosmela, was also promoted to commander in 1966.

**13.** The Board of Investigation record is classified as "Secret" and is not in evidence. It is not a verbatim transcript of the testimony, but paraphrases it. Plaintiff and some others in his behalf have seen the record, but present counsel requested its production informally and has not been given the opportunity to see it.

**14.** Some time prior to May 11, 1966, the Board recommended that plaintiff be issued a punitive letter of admonition relative to eight alleged specified derelictions in the performance of his duty.

**15.** On May 11, 1966, Admiral Ruckner, the convening authority for the Board of Investigation, sent plaintiff a letter of censure in the degree of admonition. The letter referred to the missile mishap investigation and listed four personal derelictions on plaintiff's part as weapons officer (reduced from eight derelictions recommended by the Board),[2] none of which expressly referred to the missile accident which had precipitated the Board proceeding. The letter admonished plaintiff "For such negligence in the performance of your duties", advised him of his right to appeal the action within a reasonable time (set at 15 days after receipt of the letter in the absence of unusual circumstances), and advised that a copy of the letter would be placed in his official record in BuPers unless withdrawn or set aside by

[2] Ruckner found that four derelictions recommended by the Board were not supported by the record, and disapproved that portion of the Board recommendation.

higher authority. Plaintiff was also advised of his right, within 15 days after final determination of any appeal, to submit for inclusion in his record at BuPers such statement concerning the letter of censure as he might desire. The letter concluded: "Your reporting senior is required to make notation of this letter in your fitness report submitted next after the issuance of this letter has become final, either by decision of higher authority upon appeal or by your decision not to appeal." The letter of censure was not in fact included in any of plaintiff's fitness reports since it was withdrawn. Nor was the letter of instruction which replaced it. See finding 23(l), *infra*.

**16.** Plaintiff received the letter of censure on May 28, 1966. On May 31, 1966, he wrote to Admiral Ruckner requesting a 4-month extension to prepare and file his appeal, citing the fact that on June 13, 1966, the *Luce* (with him as weapons officer aboard) would be deployed to the Mediterranean for 4 months. He also mentioned that advice of counsel would be necessary in preparing an appeal, and requested that he and his counsel have the Board record of proceedings made available to them for inspection in connection with preparing the appeal.

**17.** There followed a series of communications relative to plaintiff's effort to obtain a time extension to file his appeal, viz:

(a) On June 8, 1966, Admiral Ruckner wrote to plaintiff giving him an extension to July 20, 1966 (letter not received by plaintiff aboard *Luce* until July 27, 1966), and giving limited permission to plaintiff's military counsel to inspect the Board record.

(b) On July 7, 1966, plaintiff's father, as counsel for plaintiff, wrote to Admiral Ruckner enclosing a tentative appeal from the letter of censure citing deficiencies in the Board proceeding, requesting an extension of time for preparing an adequate appeal to 30 days after plaintiff's return to the United States, and requesting that there be made available for examination the complete Board record necessary in the preparation of an appeal.

(c) Having had no reply to his letter of May 31, 1966, requesting a time extension (Admiral Ruckner's reply of June 8,

1966, was not received by plaintiff until July 27), and having learned by telephone on June 8, 1966, that Admiral Ruckner was considering an extension to July 20, 1966, for the plaintiff to file an appeal, the plaintiff on July 14, 1966, wrote to Admiral Ruckner advising him that the commander of the *Luce* had made available to him a copy of the Board record, and requested an extension to 30 days subsequent to the *Luce*'s return to the United States. Plaintiff advised Admiral Ruckner that preparation of his appeal was complicated by his extremely heavy operational commitments on the *Luce* during its cruise, by his inability to consult with counsel, and by his counsel's inability to obtain permission to examine the Board record.

(d) Plaintiff's letter of July 14, 1966, to Admiral Ruckner described in paragraph (c) of this finding was accompanied by a first endorsement dated July 20 by the commanding officer (Drake) of the *Luce* urging that plaintiff be given the time extension to appeal that he had requested, that plaintiff be relieved of his duties temporarily from the *Luce* and be transferred on temporary duty at Admiral Ruckner's headquarters so that he could devote requisite time to the preparation of his appeal, and stating as follows:

> This is a very critical matter to this young naval officer. In effect he feels, and perhaps with good reason, that his entire future hinges on his ability to appeal successfully from this letter. He will be in the promotion zone for Lieutenant Commander this year. He cannot help but be affected in his daily activities by thoughts about the letter and fear of its consequences. His performance of duty in this ship is affected adversely therefore, and the effect of the letter is being compounded to the detriment of all.[3]

(e) Having received plaintiff's letters of May 31 and July 14, 1966, and the letter of July 8, 1966, from plaintiff's father, all of them relative to plaintiff's request for a time

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[3] Despite his predicament, note in finding 3(b), *supra*, plaintiff was apparently performing well enough as weapons officer on the *Luce* to merit an indirect commendation by Admiral Ruckner for obtaining an Excellent rating for the *Luce* during its maneuvers on that cruise. Note also plaintiff's fitness report for the period July 1 to November 28, 1966, which, along with pluses and minuses in plaintiff's performance, quotes a chief inspector's comment after the *Luce* had received an Excellent grade, that "The performance and positive attitude of the Weapons Officer [the plaintiff] is especially noteworthy and a prime factor in the ship's high state of readiness."

extension to appeal the letter of censure, on July 27, 1966, Admiral Ruckner advised the commander of the *Luce* by teletype that "no new basis for 4 months time extension exists", and that plaintiff could not be temporarily detached from the *Luce* to give him time to prepare his appeal (as the commander of the *Luce* had suggested), but that the request and Admiral Ruckner's ruling thereon would be forwarded to the C-in-C, U.S. Atlantic Fleet for "resolution and disposition." Thus as of July 27, 1966, with all the facts known as to plaintiff's absence on an extended cruise and his inability to prepare an adequate appeal to the letter of censure, Admiral Ruckner was not disposed to give him an extension.

(f) By first endorsement of August 5, 1966, Admiral Ruckner forwarded to the C-in-C, U.S. Atlantic Fleet, all of the papers relevant to the letter of censure and plaintiff's efforts to secure an extension of time to file an appeal (except the Board record which had previously been sent on May 14, 1966, to JAG via the C-in-C), and recommended to the C-in-C "that no further extension of appeal be granted, *and that the appeal be denied*." (Emphasis supplied.) A copy of this endorsement was sent to plaintiff, and another copy was sent to plaintiff's father on August 16, 1966, which was the first response the latter had received to his letter of July 7, 1966, as stated in paragraph (b) of this finding. Apparently Admiral Ruckner felt either that the correspondence he had received to date from plaintiff or in his behalf constituted a sufficient appeal, or that plaintiff's appeal time had lapsed and the right had been forfeited. (This is merely an interpretation of the Admiral's first endorsement of August 5, 1966, referred to above.)

(g) On September 30, 1966, the Deputy Chief of Staff, U.S. Atlantic Fleet, wrote plaintiff's father advising him that plaintiff was granted an extension of time to November 25, 1966, to submit his appeal from the letter of censure. The plaintiff received formal notification of the extension on November 22, 1966, abroad the *Luce* at sea [4] when he received a letter dated November 9, 1966, to that effect from the As-

[4] As observed in finding 3(b), *supra*, plaintiff was preoccupied on November 22 and 23, 1966, in maneuvers on the *Luce* which won the ship an "E" rating from Admiral Ruckner, an accomplishment largely attributable to plaintiff's functioning as weapons officer.

sistant Chief of Staff of the U.S. Atlantic Fleet based in Norfolk, Virginia. Why formal notification to plaintiff was delayed until November 9, 1966, when plaintiff's father was given formal notification by the U.S. Atlantic Fleet on September 30, 1966, is not apparent. Nor does the record reveal whether plaintiff's father was able to communicate the news of the time extension to plaintiff within a reasonable time after September 30, 1966.

(h) On November 24, 1966, plaintiff submitted his appeal, one day prior to the November 25, 1966, deadline. In his appeal plaintiff set out ten assignments of error, viz:

(1) Failure to designate plaintiff as a Party at the initiation of proceedings.

(2) Failure to afford him the rights of a Party.

(3) Refusal to permit him to withdraw his request to be made a Party.

(4) Failing to inform him of the reasons for concluding that he should be designated a Party.

(5) Making findings adverse to him.

(6) Failing to afford him a fair and impartial hearing.

(7) Subjecting his appointed counsel to improper influence.

(8) Adversely commenting upon his exercise of his right not to testify.

(9) Conducting proceedings at such time that he was unable to protect his interest.

(10) Unduly and improperly harassing the efforts of his individual counsel.

(i) Routine mail delivery from the United States to personnel on the *Luce* while it was on extended maneuvers in the Mediterranean took from 3 to 5 days.

18. On January 28, 1967, Admiral Ruckner wrote to the C-in-C, U.S. Atlantic Fleet that, based on plaintiff's appeal, he had set aside the punitive letter of censure, and requested that the copy of the letter of censure forwarded to the C-in-C previously "be destroyed or returned to the originator.", namely, himself. On February 9, 1967, the C-in-C, U.S. Atlantic Fleet, advised Admiral Ruckner by letter that the letter of censure had been destroyed as requested.

19. (a) Also on January 28, 1967, Admiral Ruckner wrote to the JAG, with copy to plaintiff, advising that plaintiff's appeal "presents substantial new evidentiary matters that are in conflict with the evidence before the board" and which, had they been available earlier, " the punitive letter may not have been issued." The new matters, said Admiral Ruckner, "do mitigate the derelictions alleged", and therefore he "has set aside the letter of admonition and issued a letter of instruction to Lt. Brenner." Finally: "Additionally, [I] consider that the investigation, as in the case of Commander Dixon M. Lademan * * * should be made a matter of interest in the official record of Lt. George H. Brenner." [5] No copy of this letter to JAG was sent to C-in-C, U.S. Atlantic Fleet.

(b) The Board record is classified as "Secret" and a copy is in the custody of JAG along with all sequential endorsements, including references to Admiral Ruckner's letter of censure to plaintiff, his withdrawal thereof and substitution of a letter of instruction, and his suggestion to JAG to deposit the entire package in plaintiff's official record as a "matter of interest." It is not disclosed when the records were transmitted by JAG to BuPers, but it is concluded that they were so transferred sometime after January 28, 1967, because on January 31, 1968, one year later, the Chief of Naval Personnel caused an endorsement to be attached thereto, which recited the instructions of January 28, 1967, received by JAG from Admiral Ruckner and stated as follows:

> * * * However, lacking a supplementary investigation to reconcile the evidentiary matters in conflict, it is not considered appropriate to hold this investigation as a matter of interest in the official records of either CDR LADEMAN, the CO of LUCE, or LT. BRENNER. * * *

(c) Also on January 28, 1967, Admiral Ruckner wrote to plaintiff stating that the proceedings of the Board were in

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[5] Commander Lademan, whose promotion to captain had been approved by the Selection Board in the summer of 1966 (see finding 12, *supra*), would not be affected to the same extent as plaintiff by the deposit of the Board record in his record as a matter of interest. Plaintiff was passed-over by the Selection Boards which convened in 1966 and 1967 (see findings 25 and 26, *infra*). By "official record" it is assumed that Admiral Ruckner's letter to JAG meant that he suggested that the Board record would be filed in plaintiff's record in BuPers. There is no indication that a letter of instruction was issued to Lademan, or that the Board recommendation found him at fault re the missile accident, although he was a Party to the investigation and attended all sessions of the Board accompanied by counsel. The Board record is not in evidence.

substantial compliance with the JAG Manual requirements for an informal investigation, but that the substantial new evidentiary matters presented in plaintiff's appeal mitigated the dereliction alleged and would have possibly averted action of a punitive nature if such matters had been available to the Board. Therefore Admiral Ruckner advised plaintiff that he had set aside the letter of censure previously issued plaintiff, and stated as follows:

> Nevertheless, it is apparent that there were deficiencies in the Weapons Department on board USS LUCE (DLG7) and that as Weapons Officer you were responsible for the proper administration of this department. Although the circumstances as now presented do not warrant punitive action, it is considered that your performance prior to the incident involved was deficient. You are, therefore, to take the contents of reference (b) [the letter of censure] as a caution, not in the sense of Article 15, UCMJ, but merely instructional in nature. Reference (b) [the letter of censure] will not be made a part of your official record and will not be forwarded to higher authority.[6] Its sole purpose is the improvement of your performance of duty.

At this time the plaintiff was no longer under Admiral Ruckner's command. Note in finding 3(b), *supra*, that on December 2, 1966, Admiral Ruckner had indirectly commended plaintiff.

(d) An official communication from Navy JAG dated August 11, 1971, and placed in evidence as a defendant's exhibit states as follows:

> The letter of admonition [*i.e.*, letter of censure in the degree of admonition] which would have been awarded as non-judicial punishment (10 U.S.C. 815) was, as Commander Cruiser-Destroyer Force U.S. Atlantic Fleet stated in his endorsement, withdrawn by him and no record that it had ever been awarded remains in any record. The letter of instruction issued in its place would of necessity be non-nonpunitive [sic] and therefore would not appear as such in Lieutenant Brenner's record. The original was undoubtedly delivered to Lieutenant Brenner with no other distribution of copies.

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[6] Note that on the same day, January 28, 1967, Admiral Ruckner had recommended to JAG that it deposit the Board record in plaintiff's official record as "a matter of interest," and that JAG make Ruckner's letter to JAG a part of the Board of Investigation record.

**20.** On February 20, 1967, plaintiff's individual counsel (his father) wrote to the JAG complaining that Admiral Ruckner had, in violation of JAG Manual provisions, directed JAG to include the Board record in plaintiff's official record as a matter of interest, after having asked the C-in-C U.S. Atlantic Fleet to destroy the letter of censure (which was done). The letter requested that the Board record reflect that the letter of censure was set aside, that the Board record not refer to the issuance of a nonpunitive "letter of instruction", and that the Board record not be made a matter of interest in plaintiff's official record as Admiral Ruckner had ordered. There is no indication as to whether this letter was ever answered or complied with, except to the extent reflected in finding 19(e), *supra*.

**21.** In May 1966 complete copies of the Board of Investigation record (including first endorsement) were sent by Admiral Ruckner to JAG, BuWeapons, Ship Missile Systems Engineering Station, Naval Weapons Evaluation Facility, and the commanding officer of the *Luce*. Also in May 1966 Admiral Ruckner sent a copy of the first endorsement to the Board of Investigation record, only, to the Commander of Cruiser-Destroyer Flotilla SIX, Commander Destroyer Squadron EIGHT: and to the senior member of the Board of Investigation (Capt. Schremp). The first endorsement indicated that a letter of censure had been issued to plaintiff. As stated in finding 19(b), *supra*, the Board of Investigation record, etc., were lodged with BuPers from sometime after January 28, 1967, until at least January 31, 1968.

**22.** (a) Throughout the 10 years of his active duty in the Navy the plaintiff received 22 periodic fitness reports. Four important sections of each fitness report are:

14. Performance of duties
15. Overall evaluation
16. Desirability
20. Leadership

Each of these listed categories on the fitness reports (except No. 15) is subclassified into either duty assignments or personal characteristics. Each of the subcategories is columnized for the officer to be rated from "Outstanding" or its equivalent (at the top of the range) down to "adverse" (at the bottom of

the range). The officer is rated by his superior officer during the particular rating period. In rating the officer, the superior will indicate by inserting X-marks in the appropriate boxes as to those subcategories for which no rating is given because the officer being rated has not been observed with respect to those subcategories. As to all other subcategories where the officer being rated was observed, the rating officer inserts an X-mark in the appropriate box to indicate as objectively as possible his judgment of the subject officer's earned rating for the period covered by the report.

23. In order to determine statistically from plaintiff's 22 fitness reports how he averaged out in comparison to a median, your trial commissioner devised a system of giving weighted points to each box, from 5 at the top end (outstanding) to 1 at the bottom end (adverse), and comparing the plaintiff's points to the artificial median. The following results were obtained from this analysis: [7]

(a) # 14—*Performance of duties*—Out of 22 reports the plaintiff equalled the median in 3 reports and exceeded the median in 19 reports.

(b) # 15—*Overall*—Out of 22 reports the plaintiff equalled the median in 8 reports and exceeded the median in 14 reports. Defendant's requested finding 12(d) analyzes plaintiff's scores in this category to reflect that in several fitness reports the plaintiff was placed at the bottom of the rating officer's list of preferences where the latter was simultaneously rating several officers. (See paragraph (g) of this finding, *infra*.)

(c) # 16—*Desirability*—Out of 22 reports the plaintiff equalled the median in 5 reports, was less than the median in 3 reports, and exceeded the median in 14 reports.

(d) # 20—*Leadership*—in 22 reports the plaintiff equalled the median in 3 reports and exceeded the median in 19 reports.

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[7] It is not known what system the Selection Board uses to analyze a promotion candidate's fitness report. This analysis does not purport to reflect the individual's standing vis-a-vis other candidates whose respective fitness reports are not before us. It merely compares the individual's point standing vis-a-vis a hypothetical median, which median is not intended to reflect the average fitness report standing of the roster of officers before any Selection Board. It is a theoretical exercise. *Cf.* a comparable effort using numerical equivalents in analyzing fitness reports appearing in finding 13 of *Norman* v. *United States*, 183 Ct. Cl. 41, 392 F. 2d 255 (1968), *cert. denied* 393 U.S. 1018 (1969).

(e) In 13 out of 22 fitness reports the plaintiff exceeded the collective median covering all 4 categories selected for analysis.

(f) In 19 out of 22 fitness reports the plaintiff equalled or exceeded the collective median covering all 4 categories selected for analysis.

(g) Plaintiff's ratings throughout the 22 reports were generally better in categories 14 and 20 (Performance of Duties, and Leadership, respectively), than in 15 and 16 (Overall, and Desirability, respectively). The categories of "Overall" and "Desirability" necessarily represent an entirely subjective and inherently imprecise value judgment by the rating officer, at least in comparison to the more objective type of grading criteria present in the "Performance of Duties" and "Leadership" categories. Thus a prickly personality could make an officer an undesirable shipmate, even though he might excel in many nautical proficiencies highly relevant to his ultimate military role.

(h) The plaintiff's most consistently successful years of achievement as reflected in the four selected categories of his fitness reports were from June 1, 1959 to June 30, 1965. In his last 3 reports covering the period from November 29, 1966, to his discharge in June 1968, he was embittered and not highly motivated as a result of being passed-over by the Selection Boards and the prospective end of his naval career through what he considered unfair circumstances.

(i) The plaintiff seemed capable of high achievement on many occasions, as witnessed in the honors and commendations which he won directly or indirectly (see finding 3, *supra*). While the plaintiff's ratings for the various categories would vary from period to period, or from rating officer to rating officer, the impression is gained from a close study of all of his fitness reports that the plaintiff excelled in such matters as ship handling, seamanship, gunnery, military bearing, loyalty, and self-expression, while he was sometimes average or less in matters of judgment, reliability, cooperation, and compassion with subordinates.

(j) Each fitness report contained a "Comments" section in which the rating officer discussed strengths, special accomplishments, contributions to the service, and minor weak-

nesses. The person that collectively emerges from these comments (with sometimes contradictory and fluctuating characteristics depending on the reaction of the individual rating officer to the individual being rated, as well as the fluctuating caliber of plaintiff's performance and motivation from one reporting period to another) is that on the plus side the plaintiff impressed many of his rating officers as energetic, highly motivated, ambitious, dedicated, alert, intelligent, enthusiastic, resourceful, and highly qualified in ship handling, seamanship, and gunnery. On the minus side the plaintiff impressed some of his rating officers as being undiplomatic, dictatorial to subordinates, bored with routine duties, lacking judgment, impulsive rather than thoughtful. Generally speaking the adverse comments respecting the plaintiff were as to facets of his character which should improve with time and maturity, and the favorable comments revealed an officer with considerable potential for achievement.

(k) Of all the comments contained in plaintiff's fitness reports, the least flattering were those on plaintiff's fitness report for the period July 1, 1965–February 19, 1966, by Comdr. Lademan. This is the period during which the missile incident of January 19, 1966, and the Board inquiry of January 22–February 17, 1966, occurred, in which both plaintiff and Comdr. Lademan were named as Parties.[8] This particular fitness report was furnished plaintiff on May 19, 1966, by BuPers, and his comments were invited. Plaintiff, who was then at sea on a protracted cruise aboard the *Luce*, responded on September 11, 1966, with a lengthy rebuttal of Comdr. Lademan's derogatory comments. The plaintiff was then aware that he was scheduled for promotion by the Selection Board and he was discouraged over the potential effect of the fitness report in question on his naval career. A response by Comdr. Lademan on October 6, 1966, defending his fitness report evaluation of plaintiff, commends the plaintiff's in-

[8] Comdr. Lademan gave plaintiff a "Satisfied to have" rating under "Desirability", which is next to the lowest rating available ("Prefer not to have"), although in the immediately preceding period Comdr. Lademan had rated plaintiff as "A very fine officer of great value to the service", which is next to the highest rating available under the Desirability category. Since the lower rating of February 19, 1966, was made 2 days after the adjournment of the Board proceeding, it is concluded that it influenced the low rating. Up until then this was the lowest rating the plaintiff had ever received.

dustry, and criticizes his proneness to antagonize others, a weakness in which Comdr. Lademan had observed an improvement. [Note that the plaintiff's Selection Board met September 27 to November 10, 1966, and plaintiff's explanation of September 11 and Lademan's response of October 6 were not received by BuPers until October 11, so there is some question as to what opportunity the Selection Board had to see these communications before passing-over plaintiff. See finding 25, *infra*.]

(1) The only reference in plaintiff's file of *fitness* reports to the subject of the Board proceeding was in the fitness report by Comdr. Drake for the period February 20, 1966–June 30, 1966, in which the rating officer observed that "During a major part of this period Lt. Brenner has been affected by his prior participation in an investigation to which he was a party, and in which he feels apparently that he was done a grave injustice."

24. Plaintiff was considered but not recommended for promotion to lieutenant-commander by a Selection Board which met from September 21 to October 22, 1965. This was not considered a "pass-over" on plaintiff's record, since he was below-the-promotion-zone on that occasion.

25. A Selection Board for the recommendation of line officers of the Navy for temporary promotion to lieutenant-commander met from September 27 to November 10, 1966. The Board consisted of eight members and 14 alternate members, all of them captains. Junior officers were appointed as recorder and assistant recorders. The "precept" convening the Board gave a quota of 324 promotions to lieutenant-commander, with limits as to certain categories, and stated that "The fact that an eligible officer is above, within, or, below the promotion zone is immaterial to the determination of whether that officer meets the criteria established by law for his category." However, a limit of 5 percent was imposed for promotion of officers below the promotion zone. (Whether this limit applied to the preceding Selection Board in 1965 in which plaintiff was below-the-zone as referred to in finding 24, is not disclosed by the record.) Eighty to 90 percent of the candidates before the 1966 Selection Board were recommended for promotion. Plaintiff was passed-over. A graduate of the Naval Academy would normally be given preference

by the Selection Board for promotion, all other things being equal, although this factor was not as influential as in prior years.

26. The next Selection Board for the lieutenant-commander promotion list met from October 3 to November 21, 1967. It was composed of eight members and 14 alternate members, all captains. Its quota of promotions was 943. As in the case of the 1966 Board, a limit of 5 percent was imposed on the number of officers recommended for promotion who had been passed-over once before. The 1967 Board recommended 80 to 90 percent of the candidates for promotion. Plaintiff was again passed-over. Under 10 U.S.C. § 6382 a second pass-over for lieutenant-commander selection automatically results in separation the next succeeding June 30.

27. A Captain Meyer was an alternate member of plaintiff's 1967 Selection Board. Meyer was known to plaintiff by reputation as an officer considered to be an authority in naval missiles and one who was familiar with the missile accident on the *Luce* because he had been involved in the investigation of the accident for BuWeapons. Plaintiff testified to his belief that Meyer either passed on his promotion candidacy at the 1967 Selection Board proceeding, or had been consulted by the members of that Board who did. By affidavit in the record Meyer conceded that he had participated in the investigation of the *Luce* accident, but denied having seen a copy of the report of the Board of Investigation concerning it, or having known of any consequences therefrom to plaintiff. While the accident was well known in the "missile Navy" circles, as an alternate member of the 1967 Selection Board, he denied having discussed the accident with the 1967 Selection Board members or the plaintiff's connection with it, nor did he hear any mention of the accident in the course of the Selection Board proceedings. There is no evidence to the contrary. Moreover, Meyer was not a member of the 1966 Selection Board where the plaintiff alleges he was first passed-over due to the Selection Board's knowledge of the missile accident, so Meyer as a source of such information would seem remote.

28. (a) Lt. Comdr. Saunders was a witness called by plaintiff. For the last 9 years of his naval service (until 1968) he was head of the Fitness Report Branch, BuPers. He was in charge of 45 civilians who administered the Navy's program

of Officer Performance Evaluations. During that period he briefed every Navy Selection Board that met, that is, he explained the documents furnished them concerning the candidates for promotion on each list, primarily the fitness report file jacket and brief sheet which was a worksheet condensed from the fitness report file jacket, and instructed the Board how to use this material in their evaluation process. The file of each candidate for promotion was screened by Comdr. Saunders' staff to insure that the record of fitness reports was complete. Each jacket would contain, in addition to the individual's fitness reports, all letters of commendation, censure, disciplinary action, and "anything coming out of an investigation, any action, derogatory action, that resulted in an investigation would logically be reflected in the Selection Board jacket." Fitness reports are of prime importance to the Selection Board to passing on promotions; the other contents of the file jacket are of secondary importance since the fitness reports should reflect anything of a derogatory nature, the specifics of which should be found elsewhere in the file jacket.

(b) Plaintiff's second Selection Board (1967) would know that plaintiff had been passed-over by the first Board because of his "lineal position" on the roster of candidates, arranged according to dates of rank. Although the fact of having been passed-over by one Board should not influence the individual's selection on his next Board, as a practical matter he is more likely than not to be passed-over by the second Board because the derogatory information in his file which caused the first pass-over is still in his file. Only a small percentage of officers with one pass-over succeed the second time.

(c) Plaintiff's pass-over problem is somewhat unusual because there are not many officers on a promotion list who are subjects of an investigation in process but not completed at the time of Board action. The investigation of the missile mishap on the *Luce* was technically completed February 23, 1968, so it was pending during both the 1966 and the 1967 Selection Board meetings.

29. (a) Comdr. Saunders has no recollection that either the 1966 or 1967 Selection Board asked him for a record of the Board of Investigation proceeding in January 1966 to which plaintiff had been made a Party. The only reference in

plaintiff's *fitness* reports to his involvement in an investigation was the fitness report for the period February 20, 1966–June 30, 1966, which comments on plaintiff's participation in an investigation (see finding 23(1), *supra*). Other references to plaintiff's involvement in that proceeding which were in the documents before the Selection Boards were (1) the letter of October 2, 1967, by Admiral Reich in plaintiff's behalf to the 1967 Selection Board (see finding 3(d), *supra*), and (2) the Security Termination Statement of February 17, 1966, which was in plaintiff's personnel file before both Selection Boards (see finding 30, *infra*). Comdr. Saunders said that if a Selection Board member had noticed these references concerning plaintiff, he could have asked him (Comdr. Saunders) to produce the Board of Investigation record for the Board to examine in evaluating plaintiff's candidacy for promotion. Since the plaintiff was issued a letter of censure in May 1966 and his first Selection Board convened in September 1966, Comdr. Saunders said "I would think that it was likely" that the Board had before it the letter of censure, since the investigation report is considered complete at the time the letter of censure is issued. Comdr. Saunders believed that a letter of instruction is normally made a matter of record for inclusion in the promotion candidate's file jacket before the Selection Board, but he was not certain of that. If a letter of censure were in a candidate's record before a Selection Board "Of course, it would have a derogatory inference as any critical or derogatory or low mark would have." He stated further: "* * * There's some question as to whether or not the [Selection] Board might have had knowledge about it [the Board of Investigation proceeding to which plaintiff was a Party] and you can't pin this down. * * *"

(b) Comdr. Saunders had no recollection of being asked by the 1966 Selection Board for the Board of Investigation record concerning plaintiff. He recalls that in late 1966 or early 1967, after the 1966 Selection Board had passed-over plaintiff the first time, the plaintiff asked him if the Board had requested the production of the Board of Investigation record concerning plaintiff, but he recalls no specifics. (Plaintiff testified that Comdr. Saunders had told him that the

1966 Selection Board had asked him (Comdr. Saunders) for the Board of Investigation record, but he had refused to provide it because the investigation was not at that time complete). Note that Comdr. Saunders considers such an investigation complete when a letter of censure is issued, apparently even when an appeal is pending, although his testimony was contradictory on this point. The fact that such a record was classified Secret would make no difference.

(c) According to Comdr. Saunders, Board of Investigation reports as to completed investigations involving a promotion candidate, deposited with JAG as a "matter of interest", were routinely made available to Selection Boards. It is clear that JAG had on file at all times a complete copy of the Board of Investigation record, and also a letter of January 28, 1967, from Admiral Ruckner referring to the fact that a letter of instruction had been issued to plaintiff.

30. A "Security Termination Statement" dated February 17, 1966 (at the conclusion of the Board of Investigation proceeding) was issued to plaintiff. It refers specifically to the Informal Board of Investigation to which plaintiff was a Party. This statement was available to plaintiff's Selection Boards.

31. Although the correspondence record is incomplete, on the basis of the clues provided in the correspondence that is in the record, coupled with the testimony of Comdr. Saunders, it is reasonable to conclude that the 1966 Selection Board knew from references in the records known to be before it, that plaintiff had been a Party to an investigation. The 1967 Selection Board would have had more certain reason to demand the complete record of the Board of Investigation proceeding and its sequelae because Admiral Reich's letter to the 1967 Selection Board on plaintiff's behalf (finding 3(d), *supra*), made specific reference to the fact. These conclusions are necessarily circumstantial because proceedings of Selection Boards are secret and not recorded.

32. On December 6, 1967, after having been passed-over by the second Selection Board, and having been transferred to a Navy Sub-Board of Inspection and Survey at Newport Naval Base, plaintiff requested an early discharge and a commission in the naval Reserve. Plaintiff was honorably discharged June 7, 1968.

33. In response to a question by the trial commissioner in the course of trial, the plaintiff testified that if he were offered reinstatement in the Navy he would decline. His age, lengthy interruption of active duty, and the ineradicable blotting of his copy book would make his advancement too unlikely as a retread. He is now selling real estate.

34. From a complete absence of evidence to that effect, it is concluded that plaintiff never applied for relief to a Board for Correction of Naval Records.

35. There is no evidence that the two selection boards that failed to recommend the plaintiff for promotion considered any derogatory material or facts outside of his fitness reports, personnel file, and official record furnished to such boards in accordance with the provisions of the statutes and Bureau of Naval Personnel Manual.

## CONCLUSION OF LAW

The court concludes as a matter of law upon the foregoing findings of fact, which are adopted by the court and made a part of the judgment herein, that the actions of the two selection boards in failing to recommend the plaintiff for promotion to the rank of lieutenant commander were neither arbitrary, capricious, nor contrary to law, and that the plaintiff is not entitled to recover active duty pay or retirement pay, and his petition is dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1979

IN THE

UNITED STATES COURT OF CLAIMS

No. 296-68

GEORGE H. BRENNER

*v.*

THE UNITED STATES

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Before DAVIS, *Acting Chief Judge*, LARAMORE, *Senior Judge* SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

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## ORDER

This case comes before the court on plaintiff's Rule 151 motion, filed November 14, 1973, for reconsideration and for rehearing *en banc* as to the decision and judgement entered herein on October 17, 1973. Upon consideration thereof, together with defendant's opposition thereto, without oral argument.

IT IS ORDERED that plaintiff's said motion for reconsideration and rehearing *en banc* be and the same is denied.

BY THE COURT

Oscar H. Davis
Acting Chief Judge

PERSONNEL OF THE Naval Reserve recalled to immediate active duty for a period in excess of 90 days.

3. By the commanding officer of the first interim reporting activity when enroute to the permanent duty station, or by the commanding officer of the first permanent duty station when no interim reporting activity is involved for those Naval Reserve officers and enlisted personnel whose active duty did not commence simultaneously with their appointment or enlistment.

4. By the Superintendent, U.S. Naval Academy, for Naval Academy Midshipmen.

(b) *Record of Submission.* The activity submitting the DD Form 53 will indicate on the original orders for officer and page 13 of service record for enlisted personnel, that this form has been completed and submitted.

(c) *Instructions for Completion.* DD Form 53 is self-explanatory; however, attention is invited to the fact that it is the function of the command rather than the individual to submit the form. The form will be reviewed by the commanding officer, officer in charge, or officer appropriately delegated whose signature will be entered in item 12 attesting to the legibility, completeness, and accuracy of the information contained therein. The information for items 2 and 3 may be obtained from the following sources, one of more of which should be in possesion of the applicant and which shall be destroyed when the DD Form 53 has been completed:

1. Registration Certificate (SSS Form No.2).

2. Notice of Classification (SSS Form No. 110).

(d) *DD Form 53 Shall NOT BE prepared For:* Persons entering active military service by induction under the Universal Military Training and Service Act, and for personnel who are found nor physically qualified for active military service.

(3) *Disposition of DD Form 53.* The commanding officer or officer in charge of the activity preparing the DD Form53 shall be responsible for the prompt forwarding of the daily accumulation of this form to the State Director of Selective Service having jurisdiction over the local board indicated in item 2 or, where such information is not available (such as in the case of an individual who, because of age or sex, has not registered), the State Director of Selective Service having jurisdiction over the area in which the person's

home address is located. DD Forms 53 containing a home address ourside of the 50 United States, Guam, Puerto Rico, Virgin Islands, or the Canal Zone, which cannot be identified with a Selective Service activity having jurisdiction, will be sent to the Director of Selective Service, Washington, D.C. 20435. The Referral Directory for Navy Veterans Counselors (NAVPERS-15832) contains the addresses of the State Directors of the Selective Service System.

(4) *Inquiries by the Selective Service System.* Strict compliance with the foregoing will keep Selective Service inquiries to a minimum. However, when a commanding officer receives an inquiry from Selective Service concerning the military status of an individual under his command, every effort shall be made to furnish the information desired.

## SECTION 2 OFFICERS' RECORDS AND ADMINISTRATIVE CORRESPONDENCE

### B-2201 OFFICER'S RECORD

(1) An officer's record maintained in the Bureau of Naval Personnel is intended to reflect the offical history of his career in the Navy. It is the property of the Government and not of the officer concerned. This official record maintained for each Navy and Naval Reserve officer contains any document which bears or reflects on the character, performance, professional qualifications and fitness of the officer. It is composed of the following files and includes, but is not limited to the document indicated:

(a) Fitness Report Jacket —

1. Reports of fitness.

2. Letters attached to and officially submitted as a part of fitness reports.

3. Photographs.

4. Statements regarding unsatisfactory fitness reports and acknowledgment of any unfavorable matter therein.

(b) Selection Board Jacket —

1. Certificates: Birth, citizenship, education and training. Commissions, appointments, acceptances, waivers, oaths of office, classification changes, records of emergency data, Statement of Personal History (DD Form 398), certificates of security clearance, and documents certifying completion of security investigative requirements.

2. Copies of citations, awards and letters of commendation or censure.

3. Reports of physical examination, medical surveys personal biographies, transcripts of service, applications for commission, notices of separation, requests for change of duty and tenders of resignation, retirement requests, and other voluntary applications for separation from active duty.

4. Written communications from the officer concerned inviting the attention of the selection board to matters of record.

5. Statements of the officer in reply to adverse matter in his selection board jacket.

6. Extracts from the findings and recommendations of courts and boards concerning the officer. These include statements of disciplinary action and promulgating letters of general court-martial. Complete records of proceedings of courts-martial, inquiries, investiagtions, etc., are filed in the Office of the Judge Advocate General.

## CHAPTER 2 —PERSONNEL RECORDS

(2); *Promotion Examinations.*—completed promotion examinations are filed in the office of the Judge Advocate General.

(3) *Access of officer's record.* —(a) Access to the record of an officer if given only to the officer personally, to the clerk of a court of competent jurisdiction in response to a valid order from that court, to the officer of the Navy Department for use in the transaction of official business, and to the representative of the officer upon presentation by such person of a written authorization from the officer concerned.

(b) The record of an officer shall be available for inspection by him or his duly authorized agent, designated as such by him in writing.

(c) The record of an officer being considered for selection is available to the selection board for use in its deliberation.

(4) *Incorporation of matter into officer's record.*—(a) Any matter that is rightfully placed in the official record of an officer may not be removed except by special authorization of the Secretary of the Navy. The record is permanent. Each day of his service career the officer is building up material for his record which, when properly entered, is there to stay. A fitness report once submitted to the Chief of Naval Personnel becomes the property of the Navy Department and is not subject to

change; however, a controversial report may be amended by correspondence forwarded via official channels, such correspondence to be attached to and made a part of the report in question. His record is reviewed when any change in his status is contemplated, such as assignment to duty, special details, examination for promotion, trial by general court-martial, or disciplinary action by the Chief of Naval Personnel, and it is of particular importance in the selection for promotion to the higher grades. In other words, in furnishing the material for his record the officer is daily adding to the evidence that is the basis of his personal and professional reputation in the service.

(b) It sometimes happens that officers either do not put forth their best efforts or fail in the strict observance of the naval code, with no intention of being lax in the discharge of their responsibilities or careless in their conduct, and without a full realization of the consequences. A mass of unfavorable matter, even though the separate entries are not in themselves of a grave nature, will naturally build up a prejudice against an officer which, in the aggregate effect, may be as detrimental to him in the years to come as a conviction by a general court-martial.

(c) Pursuant to United States Navy Regulations, adverse matter shall not be placed in an officer's record without his knowledge. In all cases it shall be referred to the officer reported on for such official statment as he may choose to make in reply. If the officer reported on desired to make no statement, he shall so state officially in writing. The Chief of Naval Personnel is liberal in his interpretation as to what constitutes adverse matter.

(d) No anonymous communications are made a part of an officer's record.

(5) *Confidential matter.* —Correspondence of a confidential nature from any source pertaining to an officer's record is filed in the personal custody of the Head Officer, Records Branch, Bureau of Naval Personnel. In the majority of cases, there is no confidential matter pertaining to the officer, and consequently no confidential file. Matter of an unfavorable nature is first referred to the officer concerned before filing. Access to an officer's confidential file is allowed as specified in paragraph (3) of this article, but authority must be granted by the Chief of Naval Personnel or the Acting Chief of Naval Personnel in each case in order to safeguard the individual officer's interests and the security of certain private or confidential matter.

## B-2202. OFFICER'S MISCELLANEOUS CORRESPONDENCE AND ORDERS FILE

(1) Correspondence of a general administrative nature pertaining to an officer is filed separately in the Bureau of Naval Personnel. This file includes such matter as copies of orders, officer order memoranda, home addresses, and material not needed in his official record for evaluation of performance.

(2) The file also includes the enlisted record of an officer of the regular Navy or Naval Reserve who was given a permanent initial appointment or warrant subsequent to 1 January 1948.

## B-2203. REPORT ON THE FITNESS OF OFFICERS

Deleted by Change 10. See BUPERSINST 1611.12 (series) for instructions for fitness reports for active duty officers (including Reserve officers performing active duty for training).

## B-2204. OFFICER QUALIFICATION RECORD

(1) *ACTIVE DUTY OFFICERS.* — Data concerning the qualifications of officers on active duty are maintained on magnetic tape as outlined in Article C-3 Because the Officer Record (Article B-2201) is available to authenticate qualifications, no separate file of documents identified as an Officer Qualification Record is maintained for an officer on active duty.

(2) *INACTIVE DUTY OFFICERS.* — Officer Qualification Records are operating files maintained for all inactive officers, including USN and USNR retired. These records are maintained primarily for the use of personnel classification analysts at the Naval Reserve Manpower Center, Bainbridge, Maryland 21905. They contain documents bearing on professional qualifications which are analyzed on a scheduled basis to update magnetic tape records. Documents in the record include the basic Officer Qualifications Questionnaire (NAVPERS 309), the Annual Qualifications Questionnaire Inactive Duty Reserve (NAVPERS 391), an Officer Data Card (NAVPERS 2626) containing qualifications

# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1694

GEORGE H. BRENNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioner, a former lieutenant in the United States Navy, who was honorably discharged on June 7, 1968, after having been passed-over for promotion to the rank of Lieutenant Commander by two successive promotion boards, instituted this action in the Court of Claims to recover certain active duty pay and the retirement pay of a Lieutenant Commander. He contends that his pass-overs for promotion, which made discharge mandatory under 10 U.S.C. 6382,[1] were arbitrary, capricious and contrary to law since the Selection Boards improperly considered certain material detrimental to petitioner. Petitioner does not seek reinstatement to the Navy (Pet. App. A-75).

[1] 10 U.S.C. 6382 provides in pertinent part that a Navy Lieutenant such as petitioner "shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time."

The material which petitioner claims was improperly before the Selection Boards refers to an informal board of investigation inquiry into an accident involving a nuclear missile which occurred aboard the U.S.S. Luce, where petitioner was assigned as weapons officer. Pursuant to the board of investigation's recommendation, a letter of censure in the form of an admonition was issued to petitioner. The letter referred to the missile mishap investigation and listed four personal derelictions on petitioner's part as weapons officer.

The letter of censure was subsequently set aside by Admiral Ruckner, the convening authority of the board of investigation, who issued a letter of instruction concerning the incident to petitioner. By an endorsement to petitioner's file dated January 31, 1968, the Chief of Naval Personnel, referring to Admiral Ruckner's instructions, directed that the investigation not be noted "as a matter of interest" in petitioner's official records (Pet. App. A-64).

Petitioner was considered but rejected for promotion to Lieutenant Commander by two successive Selection Boards in 1966 and 1967 (Pet. App. A-70 — A-71). Under 10 U.S.C. 6382, the second pass-over automatically would have resulted in petitioner's separation from the Navy the following June 30. At his own request, petitioner was discharged on June 7, 1968 (Pet. App. A-74).

Petitioner instituted this action in the Court of Claims seeking active duty and retirement pay at the rank of Lieutenant Commander. The Court of Claims construed petitioner's claim as a request to overturn the Selection Boards' denying petitioner promotion, on the ground that the Boards considered material that was improperly before them (Pet. App. A-38). The court noted the well-established principle that it is not a judicial function to promote members of the military. Finding that petitioner had not

demonstrated that the Selection Boards had considered improper material, the court held that the Boards' actions were not arbitrary, capricious or an abuse of discretion (Pet. App. A-47). The court ruled that petitioner was not entitled to recover active duty or retirement pay, and dismissed his action.[2]

2. The Court of Claims decision is correct, and the petition presents no issue warranting review by this Court.

a. Petitioner's claim for the pay of a Lieutenant Commander assumes his .promotion to that rank from his rank of Lieutenant at discharge. As the Court of Claims noted, however, it is well settled that the courts will not order military promotions. See, *e.g., Orloff* v. *Willoughby,* 345 U.S. 83; *Reaves* v. *Ainsworth,* 219 U.S. 296; *Pauls* v. *Secretary of the Air Force,* 457 F. 2d 294 (C.A. 1); *Arnheiter* v. *Chafee,* 435 F. 2d 691 (C.A. 9); *Payson* v. *Franke,* 282 F. 2d 851 (C.A. D.C.), certiorari denied *sub nom. Robinson* v. *Franke,* 365 U.S. 815. As this court has recognized, "judges are not given the task of running the [military]." *Orloff* v. *Willoughby, supra,* 345 U.S. at 93-94. Thus, as both the majority and the dissenters in the Court of Claims recognized, petitioner is not entitled to back pay on the basis of a judicially-construed promotion (Pet. App. A-39, A-53 — A-54).

b. Moreover, as the Court of Claims found, petitioner failed to establish that material other than that specified by Article B-2201 of the Bureau of Naval Personnel Manual was before the Selection Boards when they were

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[2]Three judges dissented. They relied essentially on the factual findings of the trial judge (which the court overturned) that the Selection Board had considered material not properly before it. (Pet. App. A-51 — A-52). The dissenting judges agreed, however, that petitioner was not entitled to constuctive promotion; they concluded that petitioner could claim only improper separation and pay based on his rank at discharge.

considering his promotion.[3] Indeed, the court found that the evidence was to the contrary, and that the two references to the missile incident which were part of the material before the Selection Boards were proper and not prejudicial.[4] The record supports these factual findings (Pet. App. A-71 — A-73), and in any event their correctness does not warrant further review.[5]

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[3]Article B-2201 of the Bureau of Naval Personnel Manual specifies the contents of the official service record of a naval officer, which record is all that may be considered by the Selection Board. The official service record includes material relating to periodic fitness reports of the officer, biographical information, certificates of security clearances, copies of citations, awards, and letters of commendation or censure.

[4]The two references to the missile incident merely noted the fact that petitioner had been a party to an investigation. One reference occurred in a letter sent by Admiral Eli T. Reich to the 1967 Selection Board recommending favorable consideration of petitioner's promotion (Pet. App. A-56). The other was a notation in the fitness report prepared by Commander J.C. Drake for the period February 20, 1966 — June 30, 1966 (Pet. App. A-70). Neither reference gave any details or results of the investigation.

[5]Since the Court of Claims properly found that the Selection Boards had not considered improper materials, this case is distinguishable from *Weiss* v. *United States*, 408 F. 2d 416 (Ct. Cls.), upon which petitioner relies, where the court's decision rested upon the reliance on improper materials by the Selection Boards.

Moreover, as both the majority and concurring opinions below observed, the proceeding in this case, unlike that in *Weiss*, is not a review of the Navy's Correction Board. As Judge Nichols noted in his concurring opinion, a decision of the Correction Board involves that Board's exercise of discretion; here, however, the question is whether the Selection Board considered improper material.

c. Petitioner argues that he was denied due process because the missile incident was known to the officers of the "Missile Navy" (and thus presumably to the Selection Boards). The court below found, however, that the evidence showed that no member of the Selection Boards who may have known of the incident considered or discussed it. Thus the court correctly held (Pet. App. A-45):

> We must assume in the absence of evidence to the contrary that the members of these selection boards performed their duties as officers of the government in a fair and impartial manner and in accordance with law, and that in so doing they gave [petitioner] due and proper consideration along with all of the other candidates for promotion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

SEPTEMBER 1974.

DOJ-1974-09